Supreme Court, U.S.
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No. 96-___

In The

Supreme Court of the United States

October Term, 1996

AMERICAN LIFE & CASUALTY INSURANCE COMPANY,

Petitioner,

v.

ANNE C. TROSTEL, et al.,

Respondents.

Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Prior to September 30, 1996, federal law permitted enforcement of a gold clause obligation only if it was "issued after October 27, 1977." 31 U.S.C. § 5118(d)(2). In this case, the Eighth Circuit held that an assignment in 1990 of a 1917 lease containing a gold clause constituted an "obligation issued after October 27, 1977" under Section 5118(d)(2), thus "reviving" the previously unenforceable gold clause and effectively increasing the annual rent under the lease by almost 20 times. On September 30, 1996, less than two months after the Eighth Circuit's decision in this case, Congress amended Section 5118(d)(2) to provide that a gold clause obligation is unenforceable "notwithstanding any assignment or novation of such obligation after October 27, 1977, unless all parties to the assignment or novation specifically agree to include a gold clause in the new agreement." Pub. L. No. 104-208, § 2609. The questions are:

1. Did the September 30, 1996, amendment to Section 5118(d)(2) directly overrule the Eighth Circuit's decision in this case?

2. Apart from the recent amendment to Section 5118(d)(2), did the Eighth Circuit err in holding that the 1990 assignment of the 1917 lease contained a valid post-1977 gold clause under Section 5118(d)(2), despite the fact that all of the relevant parties – lessor, lessee, and assignee – admit that none of them intended such a result?

PARTIES TO THE PROCEEDING

American Life and Casualty Insurance Company is the Petitioner. Anne C. Trostel, Harry A. Holman, Jr., H.L. Van Metre, Charles H. Van Metre, Dorothy Hurley, Terrence M. Hurley, Cmdr., and Carol Sabey are the Respondents.

RULE 29.6 STATEMENT

American Life and Casualty Insurance Company (ALCIC) owns 98% of Vulcan Life Insurance Co. ALCIC's parent is the American Life Holding Company, which is wholly owned by American Life Holdings, Inc.

American Life Holdings, Inc. is held by Conseco Partnership Management, Inc., CIHC, Inc., and Bankers Life Holding Corp. Bankers Life Holding Corp. is owned by CIHC, Inc., and Bankers National Life Insurance Company. CIHC, Inc. and Conseco Partnership Management, Inc. are wholly owned by Conseco, Inc.

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PETITION FOR A WRIT OF CERTIORARI

American Life & Casualty Insurance Company ("American Life") respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eighth Circuit in the case.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Eighth Circuit is reported at 92 F.3d 736 (8th Cir. 1996) and is reprinted in the appendix hereto ("App.") at 1a. The opinion and order of the United States District Court for the Southern District of Iowa is unreported and is reprinted at App. 18a.

JURISDICTION

The judgment of the Court of Appeals was entered on August 14, 1996. App. 1a. The Court of Appeals denied Petitioner's timely petition for rehearing and suggestion for rehearing *en banc* on September 24, 1996. App. 29a. On October 28, 1996, the Eighth Circuit denied Respondents' timely petition for rehearing. The jurisdiction of the Court of Appeals was based on 28 U.S.C. § 1291. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

PERTINENT STATUTORY PROVISIONS

Prior to September 30, 1996, Section 5118(d)(2) of Title 31, United States Code, provided: "An obligation issued containing a gold clause or governed by a gold clause is discharged on payment (dollar for dollar) in United States coin or currency that is legal tender at the time of payment. This paragraph does not apply to an obligation issued after October 27, 1977."

On September 30, 1996, Congress amended Section 5118(d)(2) by adding the following provision: "This paragraph shall apply to any obligation issued on or before October 27, 1977, notwithstanding any assignment or novation of such obligation after October 27, 1977, unless all parties to the assignment or novation specifically agree to include a gold clause in the new agreement. Nothing in the preceding sentence shall be construed to affect the enforceability of a Gold Clause contained in any obligation issued after October 27, 1977 if the enforceability of that Gold Clause has been finally adjudicated before the date of enactment of the Economic Growth and Regulatory Paperwork Reduction Act of 1996." Pub. L. No. 104-208, § 2609.

STATEMENT OF THE CASE

1. At the heart of this case is a "gold clause" contained in a 99-year ground lease on a parcel of commercial property located in Des Moines, Iowa. When the lease was entered in 1917, gold clauses were commonly included in leases, government and corporate bonds, and other long-term obligations to protect the parties from

fluctuations in the value of the dollar. *See Norman v. Baltimore & O.R. Co.*, 294 U.S. 240, 313 (1935) (railroad bond); *Perry v. United States*, 294 U.S. 330 (1935) (government bond); *Holyoke Water Power Co. v. American Writing Paper Co.*, 300 U.S. 324 (1937) (lease). The gold clause at issue here provides: "[A]t the option of the lessor, all payments under this lease shall be made in gold coin of the United States of America, of or equal to the present standard of weight and fineness." App. 2a.

The original lease called for an annual rent of $12,000. The lease was amended, however, in 1930 to increase the rent to $23,000 per year, and that amount was paid by the lessee and accepted by the lessor until December 1993. At that time Respondents, the successors in interest to the original lessor, abruptly demanded that Petitioner pay its rent in United States gold coins of the 1917 standard of weight and fineness, which in current dollars amounted to an annual rent of approximately $460,000 – almost 20 times the face amount.

The lease also contains an assignment clause, which grants to the lessee "the right to transfer or assign the lease" and provides that such an assignment, upon recordation and notice to the lessor, releases the assignor-lessee from personal liability under the lease. App. 3a. Thus, the lessor's *contemporaneous* consent to an assignment of the lease is not required. Rather, under the assignment clause of the original lease, the lessor effectively consents to any future assignment of the lessee's interest, and to the release of the assignor-lessee from liability. Petitioner American Life became the lessee in August 1990 through an assignment from its corporate parent, The Statesman Group ("Statesman"). Statesman,

in turn, had acquired the lease in December 1985 through an assignment by another entity under its control, State Automobile and Casualty Underwriters ("State Auto"), which had acquired the lease through an assignment from an unrelated entity in 1969. Thus, Statesman has controlled the lease since 1969, and it is undisputed that State Auto's 1985 assignment of the lease to Statesman and Statesman's 1990 assignment of the lease to Petitioner American Life, were effectuated for reasons wholly internal to the organization. Respondents were not signatories to the 1985 and 1990 assignment agreements. The lessor had given its prior consent to the assignments in the assignment clause of the original 1917 lease.

2. Responding to the widespread economic distress caused by the Great Depression, Congress and President Franklin Roosevelt undertook in 1933 a series of measures designed to devalue the dollar and thus to inflate domestic prices.[1] Chief among those measures was enactment of a Joint Resolution declaring all gold clauses "against public policy" and providing that

> no such provision shall be contained in or made with respect to any obligation hereafter incurred. . . . Every obligation, heretofore or hereafter incurred, whether or not any such provision is contained therein or made with respect thereto, shall be discharged upon payment, dollar for dollar, in any coin or currency which at

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[1] *See, e.g., Norman v. Baltimore & O.R. Co.*, 294 U.S. at 295-96; *Perry v. United States*, 294 U.S. at 349-54, 368; Kenneth W. Dam, *From the Gold Clause Cases to the Gold Commission: A Half Century of American Monetary Law*, 50 U. Chi. L. Rev. 504, 508-14 (1983).

> the time of payment is legal tender for public and private debts . . . .

Joint Resolution of June 5, 1933, ch. 48, 48 Stat. 112, 113.[2] In 1977 Congress amended the 1933 Joint Resolution, permitting the use of gold clauses in contractual obligations incurred after October 27, 1977. Pub. L. No. 95-147, § 49(c), 91 Stat. 1227, 1229 (1977) (codified at 31 U.S.C. § 5118(d)(2)). Congress subsequently recodified the 1933 Joint Resolution, as amended in 1977, to read as follows:

> An obligation issued containing a gold clause or governed by a gold clause is discharged on payment (dollar for dollar) in United States coin or currency that is legal tender at the time of payment. This paragraph does not apply to an obligation issued after October 27, 1977.

31 U.S.C. § 5118(d)(2).[3]

As discussed fully below, immediately following the Court of Appeals' decision in this case, Congress again amended Section 5118(d)(2). Pub. L. No. 104-205, § 2609 (Sept. 30, 1996). This recent amendment had the specific

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[2] Not surprisingly, the 1933 Joint Resolution spawned a number of constitutional challenges. This Court upheld the constitutionality of the measure insofar as it invalidated gold clauses in private obligations. *See Norman v. Baltimore & O.R. Co., supra* (railroad bonds); *Holyoke Water Power Co. v. American Writing Paper Co., supra* (private leases). The Court upheld, however, a Fifth Amendment challenge to the 1933 Joint Resolution insofar as it purported to invalidate gold clauses in the government's own bonds. *Perry v. United States, supra.*

[3] The legislative history of the recodification makes clear that Congress did not intend to effect any substantive changes to the statute. H.R. Rep. No. 651, 97th Cong., 2d Sess. 1-4 (1982).

effect of overruling the Eighth Circuit's decision in this case.

3. By letter dated December 27, 1993, Respondents demanded that Petitioner pay its rent in gold coin pursuant to the gold clause of the 1917 lease.[4] Petitioner rejected Respondents' demand for a twenty-fold increase in its rental payment, and on July 29, 1994, Respondents initiated this action to enforce the gold clause. Respondents based their claim entirely on the 1990 assignment agreement between Petitioner and its corporate parent, Statesman. Respondents argued, first, that the 1990 assignment agreement constituted "an obligation issued after October 27, 1977" under Section 5118(d)(2) and thus could lawfully contain an enforceable gold clause. Second, Respondents argued that the 1990 assignment agreement had incorporated by reference the original 1917 lease in its entirety and thus had "revived" the previously unenforceable gold clause. App. 8a. In support of their claim, Respondents relied entirely upon *Wells Fargo Bank v. Bank of Am.*, 38 Cal. Rptr. 2d 521 (Cal. App. 1995) and *Fay Corp. v. BAT Holdings I, Inc.* 646 F. Supp. 946 (W.D. Wash. 1986), *aff'd sub nom. Fay Corp. v. Frederick Nelson Seattle, Inc.*, 896 F.2d 1227 (9th Cir. 1990), both of which held that a post-1977 assignment of a pre-1933 lease containing a gold clause constituted a "novation" of the lease, thus rendering the gold clause binding and

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[4] The demand in the December 27, 1993, letter was made on behalf of parties holding two-thirds of the lessors' interests. A similar demand was made on March 29, 1994, on behalf of parties holding the remaining one-third of the lessors' interests. App. 7a and n.6.

enforceable against the new lessee. Respondents moved the district court for partial summary judgment declaring Petitioner in default under the lease for failing to make its rental payments in gold coin.

The district court rejected Respondents' arguments and entered summary judgment in favor of Petitioner. The court, "respectfully disagreeing with the basic premise" of the *Wells Fargo Bank* and the *Fay Corp.* cases, held that the 1933 Joint Resolution had voided all existing gold clauses and that the gold clause at issue here had thus been, "in effect, erased from the 1917 Lease." App. 27a. Incorporating the 1917 lease by reference into the 1990 assignment agreement therefore could not and did not revive the gold clause. Rather, "[r]eactivation of the gold clause in a post-1977 Lease would require an overt agreement between the lessor and lessee to do so." App. 28a. And here there was no such agreement; indeed, the 1990 assignment was "not undertaken with an intent to change the terms of the lease, but rather for reasons internal to the organization of Statesman." App. 24a n.1.

4. The Eighth Circuit reversed, holding that the 1990 assignment agreement satisfied all the requirements of a valid novation of the lease, which under Iowa law is " 'a substituted contract that includes as a party one who was neither the obligor nor the obligee of the original duty.' " App. 9a, quoting *Klipp v. Iowa Grain Indem. Fund Bd.*, 502 N.W.2d 9, 11 (Iowa 1993). Under Section 5118(d)(2), therefore, the parties to the 1990 assignment agreement "were legally free to incorporate a gold clause into the lease agreement at that time." App. 11a. The Court's inquiry did not end there, however, because the

gold clause in the 1917 Lease "was not specifically mentioned in 1990 as being relevant or not." App. 9a. Thus the question, according to the Court of Appeals, was whether Statesman and Petitioner could and did incorporate by reference the gold clause, along with the rest of the 1917 lease provisions, into their 1990 assignment agreement. Relying on *Fay Corp.* and *Wells Fargo Bank*, the Court of Appeals rejected the notion that the 1933 Joint Resolution had "magically erase[d] the gold clause from the 1917 lease" and concluded that "there is no reason that it could not be incorporated by reference in a new lease obligation entered into in 1990." App. 13a-14a.

The Court of Appeals also rejected Petitioner's argument that neither of the parties to the 1990 assignment agreement, nor even the lessors, had intended to change the rent term of the lease. In support of this argument, Petitioner pointed to undisputed evidence in the record that the parties to the 1990 assignment agreement – Statesman and Petitioner – had no intention of obliging Petitioner to pay rent in gold, and that Respondents themselves were not even aware until 1991 that Congress had amended the 1933 Joint Resolution to permit use of gold clauses in post-1977 obligations. App. 15a. Acknowledging that "the intent of the parties controls" the interpretation of a written contract under Iowa law, the Court of Appeals concluded that, absent ambiguity in the contract's language, "intent is determined by what the contract itself says." App. 15a. The court concluded that Petitioner had unambiguously agreed in the 1990 assignment agreement "to be bound by the terms of the 1917 lease . . . , which included an explicit gold clause," and that "the contract thus should be enforced as written." App. 15a.

Finally, the Eighth Circuit held that the phrase "of present weight and fineness" in the gold clause was ambiguous on whether it referred to the statutory standards applicable to gold coins in 1990 or in 1917. Because resolution of the ambiguity would require a factual inquiry, the Court of Appeals remanded the issue for resolution by the district court.

Both Petitioner and Respondents filed timely petitions for rehearing.[5] Petitioner reiterated its argument that the circumstances surrounding the 1990 assignment agreement, not to mention the undisputed evidence, left no doubt whatsoever that Petitioner and its parent, Statesman, did not genuinely intend to saddle Petitioner with a twenty-fold increase in its rent under the lease. Petitioner also emphasized that even if Statesman and Petitioner had intended to increase their own rental payments, they could not, as a matter of law, have done so without Respondents' specific contemporaneous agreement. Both parties to a lease must agree to any novation of the lease and the assignment clause of the 1917 lease expresses the prior consent of the lessor (Respondents) to a transfer or assignment only of the lessee's (Statesman) *existing* lease obligations. The assignment clause clearly did not express the lessors' prior consent to be bound by *new or different* lease terms contained in an assignment agreement, even new terms favorable to the lessors.

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[5] The Court of Appeals entered judgment on August 14, 1996. The Petitioner's motion for an extension of time to file a petition for rehearing was granted on August 27, 1996, and a timely petition for rehearing was submitted on September 4, 1996.

Finally, Petitioner alerted the Court of Appeals to the Ninth Circuit's recent decision in *Adams v. Burlington N. R.R. Co.*, 80 F.3d 1377 (9th Cir.), *cert. petition pending sub nom. Adams v. CSX Transp., Inc.*, No. 96-626 (filed Sept. 10, 1996), which rejected the claim that a post-1977 supplemental indenture of a pre-1933 railroad bond constituted a novation of the bond that revived a previously unenforceable gold clause. Petitioner noted that the Eighth Circuit panel's decision in this case could be construed to mean that the transfer or assignment of countless gold bonds, lease agreements, and other long-term instruments originating before 1933 will operate to resurrect previously unenforceable gold clauses, subjecting the issuers of such instruments to potentially crippling liability. The Eighth Circuit denied the petition on September 24, 1996. App. 29a.

Respondents' rehearing petition was confined to the Court of Appeals' remand for a factual inquiry by the district court into the meaning of the phrase "present weight and fineness" in the gold clause. Respondents' argued that the phrase unambiguously refers to the 1917 statutory standard for the weight and fineness of United States gold coins and that the Court of Appeals should so hold as a matter of law. The Eighth Circuit denied Respondents' rehearing petition on October 28, 1996.

5. On September 30, 1996, less than two months after the Eighth Circuit rendered its decision in this case, Congress enacted an amendment to Section 5118(d)(2) designed "to terminate unintended consequence of the 1977 law, including unfair treatment to leaseholders. The amendment ensures that the old gold clauses apply only when such a clause is the explicit intention of both parties

to the contract." 142 Cong. Rec. H4755. The amendment reads as follows:

> This paragraph shall apply to any obligation issued on or before October 27, 1977, notwithstanding any assignment or novation of such obligation after October 27, 1977, unless all parties to the assignment or novation specifically agree to include a gold clause in the new agreement. Nothing in the preceding sentence shall be construed to affect the enforceability of a Gold Clause contained in any obligation issued after October 27, 1977 if the enforceability of that Gold Clause has been finally adjudicated before the date of enactment of the Economic Growth and Regulatory Paperwork Reduction Act of 1996.

In light of this amendment to Section 5118(d)(2), on October 3, 1996, Petitioner filed in the Eighth Circuit a motion to stay the issuance of the Court's mandate, a motion for leave to file a petition for rehearing out of time, and a petition for rehearing. Petitioner argued that the new legislation directly and specifically governs this case, and neither of its requirements for finding an enforceable gold clause were satisfied. The parties to the 1990 assignment agreement did not specifically agree to include the gold clause in the agreement, nor had the enforceability of the gold clause been "finally adjudicated" prior to the enactment of the provisions. The Court of Appeals denied Petitioner's motions on October 9, 1996. App. 30a.

REASONS FOR GRANTING THE WRIT

I. CONGRESS HAS DIRECTLY OVERRULED THE DECISION BELOW BY AMENDING 31 U.S.C. § 5118(d)(2).

Less than three months ago, Congress took the issue presented by this case into its own hands and resolved it in favor of Petitioner. Responding specifically to the "unfair treatment to leaseholders" reflected in the *Wells Fargo Bank* case, the *Fay Corp.* case, and now this case, Congress amended Section 5118(d)(2) on September 30, 1996, "to terminate unintended consequences of the 1977 law" by "ensur[ing] that the old gold clauses apply only when such a clause is the explicit intention of both parties to the contract." 142 Cong. Rec. H4754-01, H4755 (May 7, 1996).[6] Just two sentences long, the amendment makes

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[6] This amendment was previously introduced as part of the United States Housing Act of 1996 (H.R. 2406). In its original form, the amendment stated, "This paragraph shall continue to apply to any obligations issued on or before October 27, 1977, notwithstanding any assignment and/or novation of such obligations after such date, unless all parties to the assignment and/or novation specifically agree to include a gold clause in the new agreement." 142 Cong. Rec. H4868. The floor manager's summary quoted in text above, to H.R. 2406 makes it clear that the amendment was aimed at foreclosing the inequities visited upon leaseholders under the reasoning adopted by the Eighth Circuit. In the Senate, this amendment was introduced as part of the Economic Growth and Regulatory Paperwork Reduction Act of 1995. The accompanying Senate Report read as follows:

> [The amendment] concerns gold clauses in real estate contracts. Gold clauses are sometimes used in real estate contracts to specify that payment is to be tendered in gold or in a dollar amount equivalent to gold. In 1933, gold clauses were made unenforceable.

clear that pre-1977 gold clause obligations are unenforceable "notwithstanding any assignment or novation of such obligation after October 27, 1977, unless *all parties to the assignment or novation specifically agree to include a gold clause in the new agreement.*" Pub. L. No. 104-208, § 2609 (emphasis added). To ensure that the amendment conformed to the separation of powers principles announced by this Court in *Plaut v. Spendthrift Farm, Inc.*, ___ U.S. ___, 115 S. Ct. 1447 (1995), Congress added the following sentence: "Nothing in the preceding sentence shall be construed to affect the enforceability of a Gold Clause contained in any obligation issued after October 27, 1977 if the enforceability of that Gold Clause has been finally adjudicated before the date of enactment of the Economic Growth and Regulatory Paperwork Reduction Act of 1977." *Id.* This case falls precisely within the language and purpose of this amendment to Section 5118(d)(2).

A. The Parties To The 1990 Assignment Agreement Did Not Specifically Agree To Include A Gold Clause In Their Agreement

It is undisputed that none of the parties to the 1990 assignment agreement specifically agreed to include in the agreement a clause binding Petitioner to pay its rent

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> In 1977, the Congress permitted gold clauses to be used again in real estate contracts. This provision would clarify that the ban on gold clauses continues for those contracts prior to 1977 and cannot be revived, through assignments or novations, unless the parties specifically agree to it.

S. Rep. No. 185, 104th Cong. 1st Sess. (1995).

in 1917 gold coins. Indeed, the Court of Appeals twice acknowledged that the gold clause was not even mentioned, let alone specifically agreed to, by the parties to the 1990 assignment agreement. *See* App. 9a ("American Life's obligations under the lease were created by the 1990 warranty agreement between it and Statesman. . . . [T]he gold clause, of course . . . was not specifically mentioned in 1990 as being relevant or not."); App. 11a ("the parties did not explicitly mention gold"). Likewise, throughout this case Respondents have conceded that neither Statesman, nor Petitioner, nor Respondents even considered the issue of the gold clause in connection with the 1990 assignment agreement.[7] Because none of the relevant parties specifically agreed to include a gold clause in the 1990 assignment agreement, it is clear that Congress' recent amendment to Section 5118(d)(2) applies to this case and that Petitioner, accordingly, cannot be required to pay its rent in gold coins.

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[7] In their briefing to the Eighth Circuit, Respondents admitted that "neither Mr. Matovina nor David J. Noble even thought about whether the 1990 Warranty Assignment contained a gold clause." Reply Brief of Appellants Trostel, et al., at 17-18. At the time of the 1990 assignment agreement, Mr. Noble was the President of both Statesman and Petitioner American Life, and Mr. Matovina was Vice-President of both Statesman and Petitioner American Life. *Id.* at 10 n.7, 17 n.9. Respondents also "admit[ted] that they did not realize until 1991 their ability to demand payment in gold following the 1977 Congressional amendment." *Id.* at 16 n.8.

B. The Enforceability Of The Gold Clause Has Not Been Finally Adjudicated

The amendment to Section 5118(d)(2) applies to all cases in which the enforceability of a gold clause had not been "finally adjudicated" as of the date of the amendment's enactment – September 30, 1996. This limitation on the retroactive application of the statute is compelled by the separation of powers principles announced by this Court in *Plaut v. Spendthrift Farm, Inc.*, ___ U.S. ___, 115 S. Ct. 1447 (1995).

In *Plaut*, the Court struck down a provision of the securities laws purporting to reopen cases that had been dismissed under the statute of limitations and on which the time to appeal had expired. "When retroactive legislation requires its own application in a case already *finally adjudicated*, it does no more and no less than 'reverse a determination once made, in a particular case.' " 115 S. Ct. at 1456 (emphasis added) (quoting *The Federalist* No. 81 p. 545 (J. Cooke ed. 1961)). Acknowledging that "Congress may require . . . that new statutes be applied in cases not yet final but still pending on appeal," *id.* at 1460 n.7,[8] the Court defined the scope of Congress' power to affect pending cases by drawing "a distinction between judgments from which all appeals have been foregone or

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[8] Indeed, the Court in *Plaut* stated: "It is the obligation of the last court in the hierarchy that rules on the case to give effect to Congress's latest enactment, even when that has the effect of overturning the judgment of an inferior court, since each court, at every level, must 'decide according to existing laws.' " 115 S. Ct. at 1457 (quoting *United States v. Schooner Peggy*, 1 Cranch 103, 109 (1801)).

completed, and judgments that remain on appeal (or subject to being appealed)." *Id.* at 1457. The Court reasoned that "the decision of an inferior court is not (unless the time for appeal has expired) the final word of the department as a whole." *Id.* Thus, the critical factor in analyzing whether a case has been finally adjudicated is the expiration of the possibility of further appellate review. *Id.* Applying these principles, the Court in *Plaut* held that the judgment at issue there became final 30 days after the district court's decision, given that no appeal had been taken. *Id.* at 1451 (citing 28 U.S.C. § 2107(a); *Griffith v. Kentucky*, 479 U.S. 314, 321 n.6 (1987)).

The *Plaut* Court specifically relied upon *Griffith v. Kentucky, supra*, in which the Court considered the retroactive application of its decisions to similar cases pending on direct review or otherwise not yet final. In holding that such decisions should be applied retroactively to all nonfinal cases, the Court in *Griffith* made clear that "[b]y 'final,' we mean a case in which a judgment . . . has been rendered, the availability of appeal exhausted, and the time for a petition for certiorari elapsed or a petition for certiorari finally denied." 479 U.S. at 321 n.6 (citing *United States v. Johnson*, 457 U.S. 537, 542 n.8 (1982)). Indeed, despite the varied approaches that the Court has taken to retroactive application of new law, it has consistently held that a case is not finally adjudicated until the date on which further appellate review is foreclosed. *See, e.g., Linkletter v. Walker*, 381 U.S. 618, 622 n.5 (1965) ("By final we mean where the judgment of conviction was rendered, the availability of appeal exhausted, and the time for a petition for certiorari had elapsed . . . ."); C.

Wright & A. Miller, *Federal Practice and Procedure* § 3529.1; *id.* at § 3938.[9]

In the instant case the Eighth Circuit's judgment was rendered on August 14, 1996, and timely petitions for rehearing were denied on September 24 and on October 28. On September 30, Congress amended section 5118(d)(2), directly overruling the Eighth Circuit's decision in this case. As of the date of the amendment's enactment, therefore, the time for filing this petition for certiorari had not yet commenced, let alone expired.[10] Accordingly, the enforceability of the gold clause in the

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[9] The lower courts have also followed this standard. *See, e.g., Georgia Ass'n of Retarded Children v. McDaniel*, 855 F.2d 805, 813 (11th Cir. 1988) ("When [Congress] so intends, its ability to affect the content of a nonfinal judgment in a civil case, through retroactive legislation ceases only when a case's journey through the courts comes to an end."); *Memorial Hosp. v. Heckler*, 706 F.2d 1130, 1137 (11th Cir. 1983), *cert. denied*, 465 U.S. 1023 (1984) ("Until appellate rights are exhausted, even an otherwise valid judgment may be negated by supervening legislation.") (citing *149 Madison Ave. Corp. v. Asselta*, 331 U.S. 795 (1947), *modifying*, 331 U.S. 199 (1947)); *United States v. O'Leary*, 973 F.2d 521, 523 (7th Cir. 1992).

[10] The reasoning behind this Court's Rule 13.3 has been explained as follows: "If a rehearing is sought in the court below, there is no absolute certainty that the judgment below will not be altered. Only when there is such certainty can the judgment properly be made the subject of a petition for certiorari. And thus it is that the time for petitioning for certiorari commences on the date when certainty and finality attach to the action taken by the lower court." R. Stern, E. Gressman, S. Shapiro & K. Geller, *Supreme Court Practice* 285 (7th ed. 1993).

1917 lease had not yet been "finally adjudicated."[11] Congress plainly intended its amendment to Section 5118(d)(2) to apply to this very case.

As previously discussed, Petitioner brought to the Eighth Circuit's attention the recent amendment to Section 5118(d)(2) immediately after its enactment and sought leave to file a petition for rehearing out of time. The Eighth Circuit denied the motion and thus declined to reconsider its decision in light of the amendment. App. 30a. This case is therefore an apt occasion for the Court to grant the petition, vacate the judgment below, and remand the case for reconsideration in light of Congress' amendment to Section 5118(d)(2). *See, e.g., Lawrence v. Chater*, ___ U.S. ___, 116 S. Ct. 604, 607 (1996) (Such an order is appropriate "[w]here the intervening developments, or recent developments that we have reason to believe the court below did not fully consider, reveal a reasonable probability that the decision below rests upon a premise that the lower court would reject if given the opportunity for further consideration. . . . "); R. Stern, E. Gressman, S. Shapiro & K. Geller, *Supreme Court Practice*

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[11] The conclusion that this case had not been finally adjudicated at the time of the amendment's enactment is bolstered by the fact that the mandate of the Eighth Circuit had not yet been issued. Given the significance generally attached to the issuance of the mandate, this fact is yet another indication that the enforceability of the gold clause had not been finally adjudicated on September 30. *See, e.g., Celotex Corp. v. Edwards*, ___ U.S. ___, 115 S. Ct. 1493, 1496 (1995); C. Wright & A. Miller, *Federal Practice and Procedure* § 3938; *Bailey v. Henslee*, 309 F.2d 840, 844 (8th Cir. 1962) (noting that a court of appeals "acts formally and officially only through its mandate").

249 (7th ed. 1993). Alternatively, the Court should grant the petition and set this case for plenary review.

II. The Decision Below Is Plainly Erroneous And Is In Conflict With A Recent Decision Of The Ninth Circuit

Even if Congress had not stepped into this case and resolved it by amending Section 5118(d)(2), the Eighth Circuit's decision would independently warrant this Court's review. The question whether the 1990 assignment agreement contained a gold clause "obligation issued after October 27, 1977," within the meaning of the 1977 amendment to Section 5118(d)(2) is a question of federal law, and it was wrongly decided by the court below. The Eighth Circuit's reasoning cannot be squared with a recent decision of the Ninth Circuit involving a gold clause in unexpired pre-1933 railroad bonds.

It is common ground between the parties – and the panel below – that the 1977 amendment to Section 5118(d)(2) did not automatically revive the gold clause in the 1917 lease. Respondents clearly could not have demanded payment in gold from the lessee at that time. Respondents and the panel agree, then, that a post-1977 new agreement or novation of the lease agreement was necessary to "revive" the 1917 obligation to pay rent in gold coin or to establish a new obligation to that effect.

According to the panel, the post-1977 agreement creating Petitioner's "new obligation" to pay the Respondents in gold coin was not an agreement between Petitioner and Respondents, but rather was the 1990 assignment agreement between Petitioner and its parent,

Statesman. As the panel acknowledged, "[Petitioner] American Life's obligations under the lease were created by the 1990 assignment agreement between it and Statesman." App. 9a. The 1990 assignment agreement, according to the panel, "did not purport to transfer [Statesman's] *own* obligations" under the lease, but instead transferred to Petitioner "the terms and conditions of the 1917 lease." App. 14a (emphasis supplied). Similarly, "[n]othing in the 1990 [assignment] agreement indicated that [Petitioner] American Life accepted only those obligations that had been legally enforceable against all previous lessees. Instead, it specifically agreed to be bound by the obligations described in the 1917 lease," which "contained an explicit gold clause." App. 15a. According to the panel, then, Statesman transferred to its wholly owned subsidiary an obligation to pay Respondents in gold coin – an obligation that Statesman itself did not have and that resulted in a nearly twenty-fold increase in the rent to be paid by Petitioner to Respondents.

While the Court of Appeals acknowledged that "the intent of the parties controls" the interpretation of a written contract under Iowa law, App. at 15a, the court simply did not come to grips with undisputed facts demonstrating, with certainty, that neither of the parties to the 1990 assignment agreement, nor even Respondents, genuinely intended the 1990 assignment agreement to require that rental payments be made in gold coin. First, as we have previously noted, the notion that Statesman and Petitioner, gratuitously and for no apparent reason, intended the 1990 assignment to obligate Petitioner to a new rental term amounting to an almost twenty-fold

increase in rental payments is, on its face, so implausible as to preclude its acceptance absent unmistakable contract language compelling such a result. The Eighth Circuit did not attempt to explain why Statesman, in effect, raised its own annual rent obligation from $23,000 to approximately $460,000. Second, it is undisputed that for over three years after the Respondents allegedly became entitled under the 1990 assignment agreement to receive an annual rent of approximately $460,000, Petitioner tendered, and Respondents accepted, monthly rental payments totaling $23,000 per year. The panel below did not attempt to explain why Respondents effectively made a donation to Petitioner of approximately $437,000 per year for over three years.[12]

Finally, and most importantly, Respondents themselves do not resist the force of these undisputed facts. They *conceded* in their briefing to the Court of Appeals that neither Statesman nor Petitioner "even thought about whether the 1990 Warranty Assignment contained a

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[12] This point is made even more telling by the undisputed fact that in 1985 Statesman acquired its leasehold interest from another wholly owned subsidiary, State Auto, in an assignment agreement that is identical in all material respects to the 1990 assignment agreement with Petitioner. Thus, if Respondents were entitled to insist on gold coin payments from Petitioner as a result of the 1990 assignment agreement, they were equally entitled to insist on gold coin payments from Statesman as a result of the 1985 assignment agreement. Yet, Respondents refrained, gratuitously and for no apparent reason, from requiring its lessees to make such payments for a total of over eight years, thus effectively making multi-million dollar gifts to Statesman and Petitioner.

gold clause." *See* note 7, *supra*. And Respondents admitted that when the 1990 assignment agreement was entered, they were not even aware that Congress had legalized post-1977 gold clauses. *Id.* Indeed, as we have noted, Respondents did not even assert their alleged right to insist on payment in 1917 gold coins until December 1993. Thus, the Eighth Circuit held that Petitioner was bound under the 1990 assignment agreement to make its rental payments in gold coin despite the fact that all parties – Statesman, Petitioner, and *Respondents* – agree that none of them genuinely intended the agreement to yield such a result. If the "intent of the parties controls" the interpretation of a written contract, then the 1990 assignment did not contain an enforceable gold clause, and the Eighth Circuit plainly erred in concluding otherwise.

The fact that Respondents were not signatories to the 1990 assignment agreement highlights another fatal defect in the Eighth Circuit's conclusion that the assignment constituted a novation reviving the gold clause. A valid novation of a lease, as the panel acknowledged, requires the "agreement of *all parties* to a *new* contract." App. 10a, citing *Klipp v. Iowa Grant Indem. Fund Bd.*, 502 N.W.2d 9, 11 (Iowa 1993) (emphasis supplied). Respondents were in no way involved in the process that culminated in the 1990 assignment agreement and thus could not and did not provide their contemporaneous consent to it. The panel, however, adopted Respondents' contention that Respondents had given "prior consent" to the 1990 assignment agreement by virtue of the assignment clause of the 1917 lease, "which provided that the lessee could transfer the leasehold and that upon such transfer

the lessee would be released from any personal liability." App. 10a n.8. Reading the assignment clause, however, to provide the lessor's prior consent to a *change* in the terms of the lease is at war both with its plain language and with common sense.

The assignment clause of the 1917 lease provides simply that "Lessees shall have the right to *transfer or assign this lease*. . . . " App. 32a (emphasis supplied). The clause does not authorize the lessee to create new lease terms or obligations. Obviously, Statesman could not transfer or assign any rights or obligations that it did not possess. Indeed, the language of the assignment clause makes clear that it is "this lease," and no other, that the lessee is authorized to transfer or assign. It follows that the assignment clause expressed the prior consent of the lessor to accept a *transfer or assignment* of the lessee's *existing* lease obligations, but it clearly did not express the lessor's consent to be bound by *new or different* lease terms.

Indeed, no rational lessor would authorize its lessee not only to substitute a new lessee that will be bound by the existing lease obligations, but also to modify the lease agreement to create new obligations binding on the lessor. If the 1917 lease had expressed the lessor's prior, unconditional agreement to abide by new lease terms created in a transfer or assignment of the lease, Statesman and Petitioner could have agreed to a severely reduced rental payment. Under the panel's reasoning, the 1917 lease would constitute the lessor's "agreement to this novation" and Respondents would thus be bound. App. at 10a n.8. The assignment clause of the 1917 lease grants the lessee no such authority. Indeed, the parties to the

original 1917 lease agreement expressly *negated* any such authority, providing that the terms of the lease were to remain unchanged in any transfer or assignment of the lease. Paragraph 24 of the original lease provides that all "successors and . . . assigns of the respective parties" to the lease are to be bound by all of the lease's terms and conditions. App. 32a. Thus, while the lease is indifferent to the substitution of a new lessee, it plainly is not indifferent to the substitution of new lease terms.

In light of the foregoing, the 1990 assignment cannot constitute a "novation" of Statesman's prior leasehold interest or otherwise satisfy Section 5118(d)(2)'s requirement of a post-1977 contract creating a new obligation to pay the lessor in gold coin. By virtue of the 1917 lease, the lessor agreed only to accept a new tenant on the *same* terms; the lessor did not make the lessee its agent with authority to negotiate on its behalf different terms or to make a new contract binding on the lessor. Thus there could not have been any prior agreement or assent by the Respondents to any understanding between Statesman and Petitioner concerning rental payments in gold coin or other modifications of existing lease terms. The Eighth Circuit plainly erred in holding otherwise.

The Eighth Circuit's reasoning in this case is squarely at odds with the Ninth Circuit's recent decision in *Adams v. Burlington N. R.R. Co.*, 80 F.3d 1377 (1996), *petition for cert. pending sub nom. Adams v. CSX Transp., Inc.*, No. 96-626 (filed Sept. 10, 1996).[13] That case involves 99-year

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[13] The *Adams* litigation was comprised of two separate actions brought by bondholders against the Burlington

bonds issued in 1899 by the Hocking Valley Railway Company ("Hocking Valley"). The bonds contained a gold clause promising to repay the principal and interest "in Gold Coin of the United States of the present standard of weight and fineness." 80 F.3d at 1379. The bonds were secured by a mortgage that permitted Hocking Valley to merge with another company so long as the corporation formed by the merger assumed payment of the bonds "according to their tenor." *Id.* In 1930, Hocking Valley was merged into the Chesapeake and Ohio Railway Company, which in turn was merged into CSX Transportation, Inc. ("CSX"), in 1987. CSX and the bond trustee entered into a supplemental indenture in 1992 that expressly assumed the obligation to repay the Hocking Valley bonds "according to their tenor." *Id.*

A group of Hocking Valley bondholders brought suit seeking to enforce the gold clause contained in the 1899 bonds, arguing that the 1987 merger and the 1992 supplemental indenture constituted an "obligation issued after October 27, 1977" within the meaning of the 1977 amendment to Section 5118(d)(2). Relying specifically on the

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Northern Railroad Company and CSX Transportation, Inc. The cases were consolidated on appeal and resolved in a single opinion. The Burlington Northern bondholders sought certiorari in this Court, which was denied. *Adams v. Burlington N. R.R. Co.*, 117 S. Ct. 171 (U.S. Oct. 7, 1996) (No. 96-51). The CSX Transportation bondholders have also sought certiorari in this Court, and their petition is still pending. That petition notes the conflict between the Ninth Circuit's decision and the decision in this case and suggests that these petitions be considered together. Petition for a Writ of Certiorari in *Adams v. CSX Transp., Inc.*, No. 96-626, at 7-9 and n.6 (filed Sept. 10, 1996).

decisions in *Wells Fargo Bank* and *Fay Corp.*, the bondholders argued that the supplemental indenture, by promising to repay the bonds "according to their tenor," had incorporated by reference the original gold clause.

The district court dismissed the action for failure to state a claim, and the Ninth Circuit affirmed. The Court of Appeals concluded that CSX's agreement to assume the Hocking Valley bond payments did not constitute an obligation issued after 1977. The "issuance" of the bonds occurred in 1899, and "[t]hese original debt obligations continued, and were assumed in their entirety by [CSX]." *Id.* at 1383. The Ninth Circuit specifically rejected the bondholders' claim that the supplemental indenture constituted a novation of the bond agreement. "It was the intent of the 1977 amendment [to Section 5118(d)(2)] to remain 'neutral' concerning bonds issued prior to 1977, not to render virtually all of them payable in gold, which would be the effect were Adams' doctrine of novation applied to bond obligations." *Id.* at 1382.

The central fact in both *Adams* and the instant case is that a contracting party's rights and obligations were transferred after 1977 to a third party in an agreement that incorporated the terms of the original instrument, including a gold clause, by reference. Yet, the two courts of appeals came to precisely opposite conclusions as to the enforceability of the gold clauses. We respectfully submit that the Ninth Circuit in *Adams* got it right and that this Court should grant certiorari in this case to resolve the conflict and to correct the Eighth Circuit's erroneous application of Section 5118(d)(2).

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted, the judgment of the Court of Appeals vacated, and the case remanded for reconsideration in light of the 1996 amendment to 31 U.S.C. § 5118(d)(2). Alternatively, the petition should be granted and the case set for plenary review.

Respectfully submitted,

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APPENDIX

No. 95-3666

Anne C. Trostel; Harry A. Holman, Jr.; H. L. Van Metre; Charles H. Van Metre; Dorothy Hurley; Terrance M. Hurly, Cmdr.; Carol Sabey, Mrs.; Plaintiffs/Appellants,	*	Appeal from the United States District Court for the Southern District of Iowa
Norwest Bank Fort Collins, N.A., Trustee/Appellant,	*	
v.	*	
American Life & Casualty Insurance Company, Defendant/Appellee,	*	
Hawkeye Bank of Des Moines, Movant.	*	

Submitted: April 10, 1996

Filed: August 14, 1996

Before BOWMAN, BEAM, and MURPHY, Circuit Judges.

MURPHY, Circuit Judge.

This case involves a gold clause contained in a 99-year commercial property lease originally executed in

1917. American Life & Casualty Insurance Company is the current lessee, having acquired the leasehold interest in 1990. The lessors, successors in interest to the original lessor, brought this contract action against American Life after it refused to pay its monthly rent installments in gold coin as specified in the original lease. The district court granted summary judgment in favor of American Life on the basis that the gold clause had been erased from the 1917 lease by a 1933 act of Congress. We reverse and remand.

On June 27, 1917 John Trostel entered into a lease agreement with Morris and Jacob Joseph for commercial property in Des Moines, Iowa.[1] The second paragraph of the lease set the amount of annual rent at $12,000 for the first five years of the lease, $15,000 for the next 49 years, and $18,000 for the remaining 45 years. It also provided that "at the option of the lessor, all payments under this lease shall be made in gold coin of the United States of America, of or equal to the present standard of weight and fineness." In a separate paragraph, ninety days written notice was required as a condition precedent to the right of the lessor to demand payment in gold. Prior to the Depression era, gold clauses such as this were often included in long term rental agreements as a sort of price-indexing mechanism to protect a lessor from the effects of inflation. *See Fay Corp. v. BAT Holdings I, Inc.*, 646 F. Supp.

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[1] The leased property was described as:

Lot Four (4) and the West one-third (W. 1/3) of Lot Three (3) in Block "C" of Commissioner's Addition to the City of Des Moines, now within the corporate limits of the City of Des Moines, Iowa.

946, 947 (W.D. Wash. 1986), *aff'd sub nom. Fay Corp. v. Frederick & Nelson Seattle, Inc.*, 896 F.2d 1227 (9th Cir. 1990).

As part of the lease, the Josephs agreed to construct a building on the property that was at least eight stories in height. The lease gave the lessees the right to transfer or assign their interest in the lease, and provided that once the building was completed a proper assignment would relieve them of any further personal liability under the lease. A fourteen story building was completed on the property in 1931 and is now known as the Des Moines Building.

The lease was amended in writing four times, by supplemental agreements in 1921, 1927, and 1930 and by an amendment in 1959. It was also supplemented by a written Agency Agreement dated September 24, 1959.[2] Among other things, the amendments related to the building construction deadline, rent increases, and the appointment of an agent for the collection and receipt of rent.[3] Each of these amendments was recorded. None of

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[2] The amendment in 1959 related to the adoption of this Agency Agreement.

[3] In May 1921 the deadline was extended for the construction of the building on the property. In July 1927 a further extension was added, but it was agreed that the rent would increase each year that the building was not completed after the amended deadline. A 1930 amendment provided that the new lessee would construct a 14 story building on the property and the rent would increase upon its construction, and appointed an agent for the collection and receipt of rent. In 1959 the rights of the parties regarding rent payment, insurance, and notice were simplified and clarified.

these modifications referred to the gold clause in the original lease.

In 1933 Congress passed legislation which affected all gold clauses. A joint resolution of Congress declared gold clauses to be against public policy and provided that "dollar for dollar" payments in United States currency would discharge any obligation. Joint Resolution of June 5, 1933, 48 Stat. 112, 113 (1933) (formerly codified at 31 U.S.C. § 463) (codified as amended at 31 U.S.C. § 5118(d)(2)). This was one of a series of measures taken to stabilize the value of United States currency. *See Norman v. Baltimore & O.R. Co.*, 294 U.S. 240, 295-97 (1935). During the same period, private ownership of gold was banned and the dollar was devalued. *See Rudolph v. Steinhardt*, 721 F.2d 1324, 1325-26 (11th Cir. 1983) (citing Kenneth W. Dam, *From the Gold Clause Cases to the Gold Commission: A Half Century of American Monetary Law*, 50 Chicago L. Rev. 504 (1983)).

Subsequently in 1975 Congress repealed the ban on private ownership of gold, and in 1977 it passed an amendment to the 1933 gold clause statute. The amendment provided that the provisions of the 1933 statute would not apply to obligations issued after October 27, 1977. Act of October 28, 1977, Pub. L. No. 95-147, § 4(c), 91 Stat. 1227, 1229 (codified as amended at 31 U.S.C. § 5118(d)(2)).[4] In other words, as of October 28, 1977, it was once again legal to contract for payment in gold.

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[4] The 1977 amendment was originally codified at 31 U.S.C. § 463 (note), but in 1982 it was recodified at § 5118(d)(2) with only nonsubstantive changes. The statute currently provides:

> An obligation issued containing a gold clause or governed by a gold clause is discharged on payment

The interest in the Des Moines Building lease has been transferred numerous times, and three of the transfers are considered relevant by the parties. On May 7, 1969, State Automobile and Casualty Underwriters (State Auto) acquired the leasehold estate pursuant to a Warranty Assignment and Assumption. In this document, State Auto agreed to be bound by all of the terms and conditions of the 1917 lease, as amended by specific written and recorded amendments. The parties agree that this transfer of interest was a novation that created a valid contract between lessors and State Auto and that released the prior lessee from any obligation.

On December 20, 1985, State Auto transferred the leasehold interest to The Statesman Group, Inc. (Statesman), which later transferred it to American Life on August 15, 1990.[5] The 1985 and 1990 transfers were each accomplished pursuant to a recorded Warranty Assignment and Assumption (warranty agreement) similar to that used in the 1969 transaction.

(dollar-for-dollar) in United States coin or currency that is legal tender at the time of payment. This paragraph does not apply to an obligation issued after October 27, 1977.

[5] State Auto, The Statesman Group, and American Life are related corporate entities. At the time of the 1969 lease transfer, The Statesman Group controlled State Auto by owning 100% of the stock of its attorney-in-fact, Automobile Underwriters Corporation. At the time of the lease transfer to American Life in 1990, the Statesman Group directly owned and controlled 100% of American Life stock.

The 1990 warranty agreement, which is the basis of the current lease, specifically incorporated the terms of the 1917 lease. It provided that Statesman:

> does hereby sell, transfer, assign and setover unto [American Life] the leasehold estate more particularly described in that certain lease dated June 27, 1917, and recorded in the office of the Recorder of Polk County, Iowa, on April 25, 1923, in Book 870, Page 497, wherein Joseph (sic) and Jacob Joseph are the Lessees; as amended by Supplemental Agreement dated May 6, 1921, recorded in the office of said County Recorder on April 25, 1923, in Book 870, Page 501; as further amended by Supplemental Agreement dated July 20, 1927, in Book 1011, Page 239; as further amended by Supplemental Agreement dated may 31, 1930, in Book 1107, Page 291; and as further amended by Amendment to Lease dated September 1, 1959, recorded in the office of said County Recorder on October 2, 1959, in Book 3190, Page 331; and as further supplemented by Agency Agreement dated September 24, 1959, recorded in the office of said County Recorder on January 4, 1963, in Book 3476, Page 476 . . . .

Statesman also warranted that the lease "has not been cancelled, surrendered or modified except pursuant to those supplements above specified and that said Lease is in full force and effect." The document also provided that American Life as grantee:

> hereby accepts, assumes and agrees to be bound by all of the terms and conditions to be kept, observed and performed by the lessee in said lease, as amended above described, from and after August 1, 1990 . . . .

In a letter dated December 27, 1993, an attorney for the lessors demanded payment of the rental obligation from American Life in gold coin pursuant to paragraph two of the 1917 lease.[6] On March 25, 1994 American Life delivered a cashier's check in the amount of $515,583.33 to the agent, along with a letter explaining that it represented the total rental obligation for the remaining lease term through the year 2016.[7] The letter claimed that the payment to the agent constituted a complete discharge of all rent owing. Although the 1917 lease required that rent be paid monthly in advance, American Life claims that requirement is superseded by language in the 1959 amendment related to the appointment of an agent for rent collection.

The lessors' attorney instructed the agent to hold the check for a week, after which he advised that the tender had been refused and instructed the agent to return the check to American Life. American Life has refused to accept the check back, and no rent has exchanged hands since that time.

The lessors filed this case against American Life on July 29, 1994, claiming that it had breached the lease

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[6] The attorney at that time represented parties holding 2/3 of the lessors' interests. He repeated the demand on March 29, 1994 on behalf of the lessors holding the remaining 1/3 interest.

[7] American Life was apparently attempting to avoid the operation of the gold clause by paying off the lease within ninety days of receiving notice. The 1917 lease required that the lessor give ninety days notice of its demand for payment in gold. Because notice was given December 27, 1993, the required payment in gold would start in April 1994.

contract by failing to make payments in monthly installments and in gold coin. They believe that the 1990 transfer of the leasehold interest to American Life was a new obligation entered into after the 1977 amendment which once again permitted requirements of payment in gold. In their view the gold clause in the 1917 lease was revived by the terms of the 1990 warranty agreement. American Life argued that the gold clause was not part of the current lease and that its prepayment of rent for the remainder of the lease term satisfied its rental obligation.

The district court granted summary judgment for American Life and dismissed the action. It held that even if a new obligation had been created in 1990, the gold clause could not have been incorporated in it by reference to the terms of the 1917 lease because the 1933 act had rendered that clause void and erased it from the 1917 lease. The lessors appealed, arguing that the gold clause had not been erased from the 1917 lease, that it was revived by what they refer to as a novation in 1990, and that American Life breached the lease by refusing to pay in gold coin and by failing to make rental payments in monthly installments. American Life responds that the gold clause was erased from the original lease by the act of Congress. It also claims that the gold clause was severed from the lease by a novation in 1969, that the current lease between lessors and American Life does not contain a gold clause because the 1990 transfer was not a novation, and that its prepayment of rent for the remainder of the 99 year term satisfied its rental obligation. It alternatively argues that if the gold clause is enforceable, the amount due should be based on the value of gold in 1990 rather than in 1917.

The issue we must determine is whether the current obligations between the parties include the gold clause contained in paragraph two of the 1917 lease. American Life's obligations under the lease were created by the 1990 warranty agreement between it and Statesman. On its face the warranty agreement incorporates all of the terms of the 1917 lease. That lease included the gold clause, of course, which was not specifically mentioned in 1990 as being relevant or not.

If the 1990 transfer of interest created a new obligation between lessors and American Life, it could legally contain a gold clause because it took place after the time that gold clauses were prohibited. *See* 31 U.S.C. § 5118(d)(2); *Fay Corp. v. BAT Holdings I, Inc.*, 646 F. Supp. 946, 952 (W.D. Wash. 1986), *aff'd sub nom. Fay Corp. v. Frederick & Nelson Seattle, Inc.*, 896 F.2d 1227 (9th Cir. 1990) (gold clause in 99-year lease entered into in 1929 revived by post-1977 novation of contract); *Wells Fargo Bank v. Bank of America*, 38 Cal. Rptr. 2d 521, 529 (Cal. Ct. App. 1995) (same). The 1990 transfer of interest would create such a new obligation if it constituted a novation of the lease. *See Fay Corp.*, 646 F. Supp. at 952; *Wells Fargo Bank*, 38 Cal. Rptr. 2d at 529.

American Life states in its briefs that the 1990 transaction was not a novation, but it does not dispute that a valid new obligation was formed. Instead it argues that the new obligation did not contain a gold clause. Iowa law describes a novation as "a substituted contract that includes as a party one who was neither the obligor nor the obligee of the original duty." *Klipp v. Iowa Grain Indem. Fund Bd.*, 502 N.W.2d 9, 11 (Iowa 1993) (quoting Restatement (Second) of Contracts § 280 (1981)). To prove

a novation under Iowa law, a proponent must show four elements: 1) a previous valid obligation; 2) agreement of all parties to a new contract; 3) extinguishment of the existing contract; and 4) validity of the new agreement. *Id.*

In this case there is no question that a valid previous lease obligation existed between Statesman and the lessors, that all parties agreed to a new contract,[8] that the obligations of Statesman were extinguished, and that a valid lease was created between lessors and American Life. American Life asserts that there was no novation as to the gold clause itself because the parties did not intend to incorporate it into the new lease. That argument involves how to interpret the terms of the existing contract, not whether a novation took place.[9] American Life does not suggest that the 1990 transaction was anything other than a novation.

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[8] The lessors' agreement to the novation arises from a clause in the 1917 lease which provided that the lessee could transfer the leasehold and that upon such transfer the lessee would be released from any personal liability. There is no claim here that the prior consent was invalid.

[9] Specifically, American Life claims there was no novation of the gold clause because the previous obligation between Statesman Group and lessors did not contain a gold clause. Even if the previous lease did not incorporate the gold clause, the terms of the new lease created by the novation are not limited to those in the previous lease. *See* Restatement (Second) of Contracts § 280 cmt. a (1981). American Life also claims that there was no meeting of the minds about whether to include a gold clause, but the explicit terms of the contract unambiguously suggest otherwise.

We conclude that under Iowa law the 1990 transfer of interest was a novation and that the parties were legally free to incorporate a gold clause into the lease agreement at that time. *See* 31 U.S.C. § 5118(d)(2); *Fay Corp.*, 646 F. Supp. at 952; *Wells Fargo Bank*, 38 Cal. Rptr. 2d at 529. That does not end the inquiry, however, because the parties did not explicitly mention gold or specifically identify each lease term. Rather, the 1990 warranty agreement simply incorporated all the terms and conditions in the 1917 agreement, and that lease had a gold clause. American Life argues that the gold clause had been severed from the original lease by the 1933 act of Congress and that it was therefore no longer part of the 1917 lease terms.

The 1933 act provided that an existing (or future) obligation requiring payment in gold coin was dischargeable by payment in dollars. The parties disagree as to the effect of this statute on the gold clause in the 1917 lease. American Life says the statute amended the lease as a matter of law by removing the gold clause, but the lessors respond that the statute only made the clause unenforceable.

There is no question that between 1933 and 1977 the lessors could not successfully have demanded payment in gold coin from any lessee, but they claim that the 1917 clause was readopted by the 1990 warranty agreement and became effective pursuant to the 1977 statutory amendment. American Life admits that the 1933 act would not have prohibited the parties from contracting for a gold clause in 1990, but argues that the terms of the 1917 lease were permanently altered by the operation of

the 1933 act, which had "erased" the gold clause from the 1917 lease.

Nothing in the terms of the 1933 act suggests that an existing gold clause would be "erased" or eliminated from the lease. Congress declared "any obligation which purports to give the obligee a right to require payment in gold" to be "against public policy" and stated that "no such provision shall be contained in or made with respect to any obligation hereafter incurred." Joint Resolution of June 5, 1933, Ch. 48, 48 Stat. 112, 113 (1933) (originally codified at 31 U.S.C. § 463) (currently codified as amended at 31 U.S.C. § 5118(d)(2)).[10] The 1933 act did not direct the existing gold clauses were to be severed from

---

[10] The relevant portions of the Act state:

> Resolved by the Senate and House of Representatives of the United States of America and Congress assembled, That (a) every provision contained in or made with respect to any obligation which purports to give the obligee a right to require payment in gold or particular kind of gold or currency, or in an amount in money of the United States measured thereby, is declared to be against public policy and no such provision shall be contained in or made with respect to any obligation hereafter incurred. . . . Every obligation, heretofore or hereafter incurred, whether or not any such provision is contained therein or made with respect thereto, shall be discharged upon payment, dollar-for-dollar, in any coin or currency which at the time of payment is legal tender for public and private debts . . . .

Joint Resolution of June 5, 1993, Ch. 48, 48 Stat. 112, 113 (1933) (originally codified at 31 U.S.C. § 463) (currently codified as amended at 31 U.S.C. § 5118(d)(2)).

existing contracts, but instead rendered them unenforceable: it stated that every obligation, whenever it was incurred and whether or not it had a gold clause, was dischargeable upon payment in United States currency. *See Norman v. Baltimore & O.R. Co.*, 294 U.S. 240 (1935) (upholding 1933 act as valid exercise of Congressional power to establish a monetary system and determining that enforcement of gold clauses was incompatible with public interest).

The idea that the gold clause disappeared from the original lease is not supported by the specific text of the statute, which contemplates that contracts might continue to contain gold clauses by referring to "every obligation heretofore or hereafter incurred." Moreover, the text of the 1977 amendment refers to obligations "containing" gold clauses.

American Life relies on cases stating broad principles such as "contract provisions that are contrary to public policy are void" to suggest that the 1933 statute operated to erase existing gold clauses. *See, e.g., McBrearty, v. United States Taxpayers Union*, 668 F.2d 450, 451 (8th Cir. 1982) (agreements contravening public policy are void); *In re NWFX, Inc.*, 881 F.2d 530, 538 (8th Cir. 1989). The cases cited do not support its claim that existing gold clauses were rendered unrevivable by the 1933 act. None of the cases involve the incorporation of a once prohibited clause into a new contract by reference to an original document containing it.

The 1933 act did not magically erase the gold clause from the 1917 lease. Although it rendered the clause unenforceable, there is no reason that it could not be

incorporated by reference in a new lease obligation entered into in 1990. *See Fay Corp.*, 646 F. Supp. at 952; *Wells Fargo Bank v. Bank of America*, 38 Cal. Rptr. 2d at 529.

American Life suggest that even if the clause were not voided in 1933, the 1969 transfer of the leasehold interest to State Auto severed the clause from the original lease. It claims that transaction was a novation that took place during the time that gold clauses were banned, but does not explain why that would delete the clause from the original lease or prevent later adoption of the original clause. The gold clause would of course not have been enforceable against State Auto because its obligation was entered into prior to the 1977 amendment. When it transferred the leasehold to Statesman in 1985, however, it did not purport to transfer its own obligations, but instead described the leasehold by the terms of the original lease. Similarly, the transfer of interest from Statesman to American Life in 1990 referred to the terms and conditions of the 1917 lease.

The 1917 lease contained an explicit gold clause, and neither the 1933 act nor the 1969 novation prevented its incorporation by reference into the terms of the new lease in 1990. The gold clause was valid at the time the original lease was executed, and although it was rendered unenforceable after 1933, it remained a written term of the lease as recorded and amended. The leasehold interest was transferred to American Life after the prohibition on gold clauses had been set aside by Congress, and the transfer specifically referred to the obligations described in the 1917 lease and its written amendments. Nothing in the 1990 warranty agreement indicated that American Life accepted only those obligations that had been legally

enforceable against all previous lessees. Instead it specifically agreed to be bound by the obligations described in the 1917 lease and its written amendments.

American Life also suggests that the existing obligation between it and the lessors does not contain a gold clause because the parties did not intend to include a gold clause as a contract term in 1990. It claims that there is extrinsic evidence that the parties did not reach a meeting of the minds about incorporating a gold clause into the contract in 1990. That evidence includes affidavits to the effect that American Life did not intend to assume an obligation to pay rent in gold, as well as the fact that the lessors became aware that gold clauses could legally be incorporated into new agreements in 1991.

When construing a written contract under Iowa law, the intent of the parties controls, and unless there is ambiguity, intent is determined by what the contract itself says. *See Howard v. Schildberg Constr. Co.*, 528 N.W.2d 550, 554 (Iowa 1995); *Anderson v. Aspelmeier, Fisch, Power, Warner & Engberg*, 461 N.W.2d 598, 600 (Iowa 1990). The language of the 1990 warranty agreement is not ambiguous. American Life agreed to be bound by the terms of the 1917 lease as recorded and as amended by the specified recorded amendments. The intent of American Life to be bound by these terms, which included an explicit gold clause, is expressed in clear and unambiguous language, and the contract thus should be enforced as written. *See Howard*, 529 N.W.2d at 554.

American Life also claims that its advance payment of rent on the remaining years of the lease satisfied its obligations. The 1917 lease required that the rent be paid

to the lessor monthly in advance. American Life concedes that such a provision generally precludes a lessee's right to prepay rent, but claims that the 1959 amendment to the lease superseded it and allowed prepayment.

The 1959 amendment was made to "simplify and clarify the arrangements as to payment of rent, the handling of insurance policies, the deposit of evidences of payment of taxes and other items, the designation of Agents, the giving of Notices, and the treatment of Lessee's option to purchase the fee title to the real estate." It made specific changes to several paragraphs of the original lease including paragraph 31, which had been added by amendment in 1930. Paragraph 31 provided that an agent would be appointed, that its duties were to be "essentially ministerial," and would "include the collection and receipt of rents under said lease." The amendment provided that delivery to the agent "of checks, money, notices, documents, written information, and the like," would "constitute delivery thereof to Lessee or Lessors." It further stated:

> The payment of rent by the Lessee to such an Agent shall constitute a complete discharge of the rent so paid, and the Lessee shall not be required to take notice of the termination of any such Agent's authority or the appointment of a successor unless notified in writing thereof in the manner in this lease provided for the service of notices.

American Life argues that the 1959 amendment removed the requirement that rent must be paid monthly or at least creates an ambiguity whether it must. By its terms, however, the 1959 amendment relates only to

whom the rent should be paid, and does not imply that the amount or timing of the payment would be affected. The contract as amended is unambiguous that the rent must be paid to the agent monthly in advance. American Life could not fulfill its obligations under the contract by prepaying the rent for the remainder of the term.

The parties also disagree on the proper value of any gold payment required. American Life claims the requirement of payment in gold "of present weight and fineness" would refer to the value in 1990, rather than in 1917. The lessors believe that the value of gold in 1917 was intended. The district court did not consider this issue because it held that the gold clause could not have been revived as a matter of law. Since the term relating to "present weight and fineness" is ambiguous, resolution of the issue will involve a factual inquiry. It should therefore be addressed in the first instance by the district court.

For the stated reasons, the judgment is reversed and the case is remanded for further proceedings consistent with this opinion.

A true copy.

Attest:

CLERK, U.S. COURT OF APPEALS, EIGHTH CIRCUIT.

IN THE UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF IOWA
CENTRAL DIVISION

ANNE C. TROSTEL, et al.,	*	
Plaintiffs,	*	CIVIL NO. 4-94-70494
v.	*	RULINGS ON CROSS-MOTIONS FOR SUMMARY JUDGMENT, AND ORDER OF DISMISSAL
AMERICAN LIFE & CASUALTY INSURANCE COMPANY,	*	
Defendant.	*	(Filed Sep. 29, 1995)

Plaintiffs, owners of interests in a parcel of land in downtown Des Moines, Iowa, are successors in interest to John Trostel, lessor under a lease agreement executed in 1917. Plaintiffs bring suit against defendant, the current lessee, seeking specific performance of a clause in the lease allowing the lessors to require payment of the monthly rent in gold coin. Defendant moves for summary judgment. Plaintiffs resist and move for partial summary judgment. Arguments were heard and the motions are submitted.

Summary Judgment Standard

Rule 56 of the Federal Rules of Civil Procedure provides that summary judgment

> shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to

> any material fact and that the moving party is entitled to a judgment as a matter of law.

Fed. R. Civ. P. 56(c). Rule 56(e) requires the nonmoving party to go beyond the pleadings and by affidavits, or by the depositions, answers to interrogatories, and admissions on file, designate "specific facts showing that there is a genuine issue for trial." Fed. R. Civ. P. 56(e); *Celotex Corp. v. Catrett*, 477 U.S. 317, 322-23 (1986); *Johnson v. Schopf*, 669 F. Supp. 291, 295 (D. Minn. 1987).

Summary judgment is appropriate only where no genuine issue of material fact exists and the moving party is entitled to judgment as a matter of law. *Celotex*, 477 U.S. at 322-23; *Kopp v. Samaritan Health Center, Inc.*, 13 F.3d 264, 268 (8th Cir. 1993). On a motion for summary judgment, the court views all the facts in the light most favorable to the nonmoving party, and gives that party the benefit of all reasonable inferences that can be drawn from the facts. *Kopp*, 13 F.3d at 269; *United States v. City of Columbia, Mo.*, 914 F.2d 151, 153 (8th Cir. 1990).

Facts

The parties are in agreement as to most of the basic facts. In 1917, a ninety-nine year lease was entered into between John Trostel, lessor, and Morris and Jacob Joseph, lessees. The agreement is currently comprised of the original Lease dated June 27, 1917, and four amendments: a Supplemental Agreement dated May 6, 1921; a Supplemental Agreement dated July 20, 1927; an Amendment to Lease dated May 31, 1930; and an Amendment to Lease

dated September 1, 1959. There is also an agency agreement, pursuant to certain terms in the 1959 amendment, which was entered into on September 24, 1959.

Terms of the Lease

Many of the lease terms are relevant to the cross motions, including the following.

> Second. The Lessees covenant and agree to pay to the Lessor, as rent for said demised premises, during the first five years of said term, the annual rental of Twelve Thousand Dollars ($12,000.00), to be paid to the lessor in equal monthly installments of One Thousand Dollars ($1,000.00), each in advance, on the first day of each month during said period of five years.

The rent was scheduled to increase after five years and again after the fiftieth year. The rent term was amended by the 1930 Amendment and the rent prior to the dispute leading to this case was $23,000 per year. Paragraph "Second" of the 1917 Lease also includes the so-called "gold clause" at the heart of this dispute:

> At the option of the lessor, all payments under this lease shall be made in gold coin of the United States of America, of or equal to the present standard of weight and fineness.

The "gold clause" was modified by paragraphs "Third" and "Twenty-fifth":

> Third. It is expressly understood and agreed by and between the parties that no acceptance by the Lessor of any currency, legal tender, checks, coin, money, or value whatever, except

> standard gold coin of the United States of America, as hereinbefore specified, in payment of any installment of rent, shall be construed to be a waiver on the part of the Lessor to demand the payment of any other unpaid installment of rent in standard gold coin * * * .
>
> Twenty-fifth. As a condition precedent to the right of lessor to demand payment in gold coin of amounts becoming due to him under this lease, he shall give ninety days' written notice thereof to lessees.

The original Lease also required that lessees construct a building on the property that was to meet certain specifications and be completed by a date set in the Lease. The specifications and required completion date were amended by the 1921 Supplemental Agreement and the 1927 Supplemental Agreement. The 1927 Supplemental Agreement also amended the right of assignment, making reference to the required building:

> Twenty-second. Lessees shall have the right to transfer or assign this lease, but said transfer or assignment shall be without force and effect until the assignment thereof has been filed of record in the office of the County Recorder in and for Polk County, Iowa, and until notice of such assignment has been given to said Lessor or his authorized agent. The Lessees, however, shall remain liable under this lease, notwithstanding such assignment, until the completion of said eight-story building * * * whereupon their personal liability shall cease.

Finally, the 1959 Amendment makes clear that payment or rent or service of any notices with the joint agent constitutes delivery to the lessor and the lessee. Payment

of rent to the agent constitutes complete discharge of the rent.

Chronology of Events

In 1917, the original Lease was signed. Amendments were made in 1922, 1927, and 1930.

In 1931, a fourteen-story building was completed on the subject property, fulfilling those conditions in the Lease relating to or linked to such improvements.

In 1933, Congress passed a Joint Resolution, invalidating gold clauses, which provided, in pertinent part:

> (a) every provision contained in or made with respect to any obligation which purports to give the obligee a right to require payment in gold or a particular kind of coin or currency, or in an amount of money of the United States measured thereby, is declared to be against public policy; and no such provision shall be contained in or made with respect to any obligation hereafter incurred. Every obligation, heretofore or hereafter incurred, whether or not any such provision is contained therein or made with respect thereto, shall be discharged upon payment, dollar for dollar, in any coin or currency which at the time of payment is legal tender for public and private debts.

Act of June 5, 1933, 48 Stat. 112-113 (originally codified at 31 U.S.C. § 463; codified as amended at 31 U.S.C. § 5118) (hereinafter the "1933 Act").

In 1959, the Lease was again amended, and the parties entered into the agency agreement.

In 1969, National Realty Investors, then the lessee, executed a "Warranty Assignment and Assumption" in which it agreed to

> sell, transfer, assign and set over unto Automobile Underwriters Corporation, an Iowa Corporation, Attorney-in-Fact for State Automobile and Casualty Underwriters * * * the leasehold estate more particularly described in that certain Lease dated June 27, 1917 * * * .

It is undisputed that this transfer was in the form of a novation and, therefore, a new contract.

In 1977 and 1982, Congress passed P.L. 95-147 and P.L. 97-258, amending 31 U.S.C. § 5118(d)(2) to read:

> An obligation issued containing a gold clause or governed by a gold clause is discharged on payment (dollar for dollar) in United States coin or currency that is legal tender at the time of payment. *This paragraph does not apply to an obligation issued after October 27, 1977.*

(emphasis added).

In 1985, State Automobile and Casualty Underwriters ("State Auto") executed a "Warranty Assignment and Assumption" transferring "the leasehold estate more particularly described in that certain Lease dated June 27, 1917" and amendments to The Statesman Group, Inc. ("Statesman").

In 1990, Statesman, using the same language, transferred its interest to defendant, American Life and Casualty Insurance Company ("American Life").[1]

On December 27, 1993, plaintiffs first gave notice to defendant of their intent to exercise the option to be paid in gold. On March 25, 1994, defendant delivered to the joint agent a check for $515,583.33, representing the outstanding balance of the lease at the current rent through the expiration date, August 31, 2016. In a letter dated March 29, 1994, plaintiffs informed the joint agent and defendant that they would not accept the offer of prepayment and returned the check to the agent. Defendant refused to accept the returned check and has made no further rent payments.

Discussion

Plaintiffs attempt to enforce, for the first time, the "gold clause" contained in the 1917 Lease. To do so, all of the following must be established. First, the 1933 Act that invalidated gold clauses must have rendered such clauses unenforceable rather than totally voiding the clauses. Second, because the 1969 novation took place when gold

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[1] In 1969, Statesman owned 100% of the stock of Automobile Underwriters Corporation (AUC), the Attorney-in-Fact for State Auto. The relationship between Statesman, State Auto, and AUC remained unchanged through the date of the 1985 assignment. As of the date of the 1990 assignment, Statesman owned 100% of the stock of defendant American Life. The reasons for the 1985 and 1990 assignments were not undertaken with an intent to change the terms of the lease, but rather for reasons internal to the organization of Statesman.

clauses were still prohibited, the gold clause must have survived the 1969 novation, allowing that provision to be transferred after 31 U.S.C. § 5118 was amended to permit such provisions. Third, one or both of the 1985 and 1990 transfers would have to be a novation. Finally, the post-1977 novation must have created a valid new contract that included the gold clause among its terms.

The 1933 Act Renders Gold Clauses Void

Interpretation of the 1933 Act and its effect on the post-Act viability of gold clauses has not been addressed by the Eighth Circuit. Upon a careful review of the language of the 1933 Act I believe that the 1933 Act, by its terms, does more than merely render gold clauses unenforceable. Gold clauses already in existence were "declared to be against public policy," and with respect to future contracts, the Act made clear that "no such provision shall be *contained in or made* with respect to any obligation hereafter incurred."

The public policy was evidently a strong one: gold clauses were prohibited for more than forty years, and in 1934, Congress went even further, banning the private ownership of gold. *Fay v. BAT Holdings I*, 646 F. Supp. 946, 948 (W.D. Wash. 1986). As a general rule, an agreement or term of an agreement that contravenes public policy is void. *McBrearty v. U.S. Taxpayers Union*, 668 F.2d 450, 451 (8th Cir. 1982); *see also In re NWFX, Inc.*, 881 F.2d 530, 538 (8th Cir. 1989) ("[I]n most other jurisdictions, contracts which are contrary to public policy are void."); *cf. Jordan v. Iowa Dept. of Transp.*, 468 N.W.2d 827, 830 (Iowa 1991) (recognizing "void as against public policy" defense, but

finding facts of case did not establish a violation of any clear public policy).

Interpreting the 1933 Act as voiding gold clauses rather than rendering them unenforceable is also the most logical reading of the Act's prohibition against such clauses being "contained in" contracts. *See* Black's Law Dictionary 1573 (6th ed. 1990) (defining void as "null; ineffectual; nugatory; having no legal force or binding effect * * * .")

I conclude that the 1933 Act voided all extant gold clauses, including the clause in the 1917 Lease. Moreover, as the 1933 Act prohibited gold clauses from being "contained in" future agreements, the clause would have been severed from the Lease by the 1969 novation that occurred while the prohibition against gold clauses was in effect.

Gold Clause Not Reinstated After 1977 Amendment

The only way plaintiffs can enforce the gold clause against the current lessee is if the clause was somehow reinstated. It is clear from the language of the 1977 and 1982 amendments to the 1933 Act that the renewed allowance of gold clauses was not retroactive. *See* 31 U.S.C. § 5118(d) (the language, "[t]his paragraph does not apply to an obligation issued after October 27, 1977," was inserted rather than the prohibition being stricken). For plaintiffs to prevail there must have been some event after October 27, 1977 that renewed the gold clause.

Because the 1933 Act voided the gold clause, there are no circumstances that could restore its validity other

than the clause being part of a new, bargained-for exchange. *See* Black's Law Dictionary 1573 (6th ed. 1990) ("void in the strict sense means that an instrument or transaction is nugatory and ineffectual so that *nothing can cure it*") (emphasis added); *see also School Dist. No. 1 of Silver Bow County v. Driscoll*, 568 P.2d 149, 154 (Mont. 1977) (" 'A 'void thing' is no thing; it has no legal effect whatsoever and no right whatever can be obtained under it or grow out of it. In law it is the same thing as if the 'void thing' had never existed.' Thus * * * even a subsequent act of the legislature could not cure something that was void.") (quoting *Lowery v. Garfield County*, 208 P.2d 478 (Mont. 1949) (internal citations omitted). While it is undisputed that the 1985 and 1990 assignments referenced the 1917 Lease, that Lease could not have included among its terms an assignable gold clause. When the clause was *voided* in 1933, it was, in effect, erased from the 1917 Lease.

Wells Fargo, Fay Cases Distinguished

Plaintiffs rely on two cases, *Wells Fargo Bank v. Bank of Am.*, 38 Cal. Rptr. 2d. 521 (Cal. App. 1995) and *Fay Corp. v. BAT Holdings I, Inc.*, 646 F. Supp. 946 (W.D. Wash. 1986), *aff'd*, 896 F.2d 1227 (9th Cir. 1990), that give support to their position.

These cases are not controlling on this court. I have, of course, carefully considered the reasoning each presents. I respectfully disagree with the basic premise in each case that the gold clause was merely unenforceable and dormant, not void, after the 1933 Act.

Because I find that the gold clause in the 1917 Lease was rendered void by the 1933 Act, I conclude that the post-1977 transfers of the leasehold interest, even if they were valid novations, could not have revived the gold clause by mere reference to the 1917 Lease. Reactivation of the gold clause in a post-1977 Lease would require an overt agreement between the lessor and lessee to do so. Accordingly, defendant's motion for summary judgment will be granted and plaintiffs' motion for partial summary judgment will be denied.

Rulings and Order

Defendant's motion for summary judgment is GRANTED.

Plaintiffs' motion for partial summary judgment is DENIED.

IT IS ORDERED that plaintiffs' complaint is DISMISSED.

Dated this 29 day of September, 1995.

/s/ Harold D. Vietor
HAROLD D. VIETOR,
District Judge
Southern District of Iowa

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 95-3666SIDM

Anne C. Trostel, et al., Appellants, v. American Life & Casualty, etc., Appellee.	* * * * * * * * *	Order Denying Petition for Rehearing and Suggestion for Rehearing En Banc

The suggestion for rehearing en banc is denied. The petition for rehearing by the panel is also denied.

September 24, 1996

Order Entered at the Direction of the Court:

/s/ Michael E. Gans

Clerk, U.S. Court of Appeals, Eighth Circuit

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 95-3666SIDM

Anne C. Trostel, et al.,	*	
	*	Appeal from the United
Appellants,	*	States District Court for
	*	the Southern District of
vs.	*	Iowa
	*	
American Life & Casualty, etc.,	*	
	*	
	*	
Appellee.	*	

Appellee's motion for stay of mandate, motion for leave to file a petition for rehearing out of time, and petition for rehearing has been considered by the Court and is denied.

October 9, 1996

Order entered at the direction of the Court:

/s/ Michael E. Gans
Clerk, U.S. Court of Appeals, Eighth Circuit

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 95-3666SIDM

Anne C. Trostel, et al.,	*	
	*	Appeal from the United States District Court for the Southern District of Iowa
Appellants,	*	
v.	*	
	*	
American Life & Casualty Insurance	*	
	*	
Appellee.	*	

Appellant's petition for rehearing by the panel has been considered by the court and is denied.

October 28, 1996

Order entered at the direction of the Court:

/s/ Michael E. Gans
Clerk, U.S. Court of Appeals, Eighth Circuit

RELEVANT PROVISIONS OF THE 1917 LEASE

At the option of the lessor, all payments under this lease shall be made in gold coin of the United States of America, of or equal to the present standard of weight and fineness.

* * *

Twenty-second. Lessees shall have the right to transfer or assign this lease, but said transfer or assignment shall be without force and effect until the assignment thereof has been filed of record in the office of the County Recorder in and for Polk County, Iowa, and until notice of such assignments has been given to said Lessor or his authorized agent. The Lessees, however, shall remain liable under this lease, notwithstanding such assignment, until the completion of said eight story building, thereupon their personal liability shall cease.

Twenty-third. In case the Lessor, his executor, administrator, successor or assigns shall desire to sell said premises, then the Lessees shall have the first option to purchase the same on the same terms and conditions as given to any other party. Said lessees shall have ten days within which to exercise said option after notice in writing to said Lessees by said Lessor of his intention to sell.

Twenty-fourth. All provisions, conditions and covenants of this lease, whether it be so expressed or not, shall bind and inure to the benefit of (as the case may be) the heirs, successors and executors, administrators and assigns of the respective parties hereto.

Twenty-fifth. As a condition precedent to the right of lessor to demand payment in gold coin of amounts

becoming due to him under this lease, he shall give ninety days' written notice thereof to lessees.

FILED
JAN 15 1997

No. 96-964

In The

Supreme Court of the United States

October Term, 1996

AMERICAN LIFE & CASUALTY INSURANCE COMPANY,

Petitioner,

vs.

ANNE C. TROSTEL, *et al.*

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

RESPONDENTS' BRIEF IN OPPOSITION

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STATEMENT OF PARTIES AND CORPORATE AFFILIATES PURSUANT TO RULE 29.6

Norwest Bank Colorado, N.A. is a party respondent. Norwest Bank Colorado, N.A. serves as Trustee for one Robert Sears, one of the heirs of John Trostel. Norwest Bank Colorado, N.A. has no non-wholly owned subsidiaries. Its parent corporations are Goldenbanks of Colorado, Inc., Ken-Coryl Investment Company, Norwest Colorado, Inc. and Parker Bankshares, Incorporated.

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STATEMENT OF THE CASE

On June 27, 1917, John Trostel entered into an agreement with Morris and Jacob Joseph for the lease of land and a building in Des Moines, Iowa. The annual rent was $12,000 for the first five years, $15,000 for the next forty-nine years, and $18,000 for the remaining forty-five years. The lease also provided that "[a]t the option of the lessor, all payments under this lease shall be made in gold coin of the United States of America, of or equal to the present standard of weight and fineness." Resp. App. 1a. Prior to the Depression era, gold clauses such as this were frequently included in long-term agreements as a price-indexing mechanism to protect against the effects of inflation. *See Rudolph v. Steinhardt*, 721 F.2d 1324 (11th Cir. 1983) (providing history behind gold clauses); *see also* Kenneth W. Dam, FROM THE *GOLD CLAUSE CASES* TO THE GOLD COMMISSION: A HALF-CENTURY OF AMERICAN MONETARY LAW, 50 U. Chi. L. Rev. 504 (1983). The lease required ninety days written notice as a condition precedent to the right to demand payment in gold coin.

As part of the lease, the Josephs agreed to construct a new building on the property. The lease allowed the lessees the right to transfer or assign their interest in the lease and provided that once the new building was completed, an assignment would relieve them of any further liability under the lease. Subsequently, the lease was amended several times, by supplemental agreements in 1921, 1927, and 1930, and by an amendment in 1959. These modifications related to the deadline for constructing the building and the use of an agent for collecting and receiving the rent. In exchange for the lessors' agreement in the 1930 Amendment to co-sign a mortgage, the parties increased the schedule of rent by $5,000, resulting in the current rent of $23,000 per year. In 1931, a fourteen-story office building was completed and is now known as the Des Moines Building. John Trostel's interest in the property is now

owned by his heirs, the seven named plaintiffs ("the Trostel heirs").

The United States' policy and legal treatment of gold radically changed in the 1930s as a result of the worldwide Depression. To enable President Roosevelt to devalue the dollar, the United States was taken off the gold standard. Fearing that the public would use gold to circumvent the devaluation, Congress also banned the private ownership of gold. Accordingly, a joint resolution of Congress in 1933 declared gold clauses "to be against public policy" and unenforceable. Joint Resolution of June 5, 1933, 48 Stat. 112, 113 (1933) (formerly codified at 31 U.S.C. § 463, codified as amended at 31 U.S.C. § 5118(d)(2)).

In 1975, Congress repealed the now-anachronistic ban on private ownership of gold, and in 1977 it amended the gold clause statute. The amendment provided that the terms of the 1933 statute would not apply to "obligations issued after October 27, 1977." Pub. L. No. 95-147, § 4(c), 91 Stat. 1277, 1229 (codified as amended at 31 U.S.C. § 5118(d)(2)). As a result, after October 27, 1977, it was once again legal to contract for payment in gold.

The lessee's interest in the lease of the Des Moines Building has been transferred several times. On August 15, 1990, the lessee, The Statesman Group, Inc. ("Statesman"), transferred its interest to Petitioner, American Life & Casualty Insurance Company ("American Life"), pursuant to a Warranty Assignment and Assumption Agreement. The 1990 Warranty Agreement, which is the basis of the current lease, specifically incorporated all of the terms of the 1917 lease:

> The Statesman Group . . . does hereby sell, transfer, assign and setover unto American

> Life and Casualty Insurance Company, an Iowa insurance corporation ("Grantee") the leasehold estate ("Lease") *more particularly described in that certain Lease dated June 27, 1917* . . . .

Resp. App. 3a (emphasis added).

Statesman warranted that the lease had not been modified (except pursuant to the aforementioned amendments) and was "in full force and effect." *Id.* The Warranty Agreement also provided that American Life:

> hereby accepts, assumes, and agrees to be bound by *all of the terms and conditions* to be kept, observed and performed by the Lessee in said Lease, as amended above described, from and after August 1, 1990, and covenants and agrees to faithfully comply with, carry out and perform *all of the terms and covenants on the part of the Lessee under said Lease* . . . .

Id. (emphasis added). Consequently, Statesman was relieved of any further obligations under the lease.

In a letter dated December 27, 1993, an attorney for the Trostel heirs demanded payment from American Life in gold coin, pursuant to the terms of the 1917 lease. On March 25, 1994, within ninety days of receiving the demand, in an attempt to pay off the lease and avoid paying in gold coin, American Life delivered a cashier's check for $515,583.33 with a letter stating that this amount fulfilled the remaining rental obligation through the year 2016. The Trostel heirs' attorney instructed the agent for receipt of rents to refuse the tender and return the

check to American Life. American Life has refused to accept the check back and has not paid rent on the Des Moines Building since that time.

REASONS FOR DENYING THE WRIT

None of the reasons offered by American Life in its Petition for Writ of Certiorari satisfy this Court's standards for accepting a case for review. Rule 10 of the Supreme Court Rules requires "compelling reasons" for granting certiorari and sets forth several categories of considerations indicating which cases deserve discretionary review on certiorari. None of those considerations or compelling reasons exist in this case.

I. THERE IS NO SPLIT OF PERTINENT LEGAL AUTHORITY.

The first basis for granting certiorari listed in Rule 10(a), that a federal court of appeals has ruled contrary to another federal court of appeals or state court of last resort, does not apply to this case. "[T]he absence of any conflict among the Circuits is plainly a sufficient reason for denying certiorari." *Singleton v. Comm'r of Internal Revenue*, 439 U.S. 940, 945 (1978) (Stevens, J., opinion in denial of certiorari). "Certiorari is granted only . . . 'in cases where there is a real and embarrassing conflict of opinion and authority between the circuit courts of appeal.' " *NLRB v. Pittsburgh S.S. Co.*, 340 U.S. 498, 502 (1951) (citation omitted).

The dispositive issue in this case, stated precisely, is as follows: where a court first determines that an assignment of a lease constitutes a novation, and that lease contains a pre-1933 gold clause, is that clause rendered enforceable as a new obligation entered into after October 27, 1977? The two courts that have addressed this question have both found a novation and enforced the gold clause, as did the Eighth Circuit in this case.

In the earliest case to address the issue, *Fay Corp. v. BAT Holdings One, Inc.*, 646 F. Supp. 946 (W.D. Wash. 1986), *aff'd*

sub nom., Fay Corp. v. Frederick & Nelson Seattle, Inc., 896 F.2d 1227 (9th Cir. 1990), the Ninth Circuit upheld a district court's detailed opinion enforcing a revived gold clause. In 1929, The Fay Corporation executed a 99-year lease of land and premises in downtown Seattle for $8,333 monthly rent, which was payable at the lessor's option in "lawful gold coin of the United States of America of the present standard of weight and fineness." 646 F. Supp. at 948. The leasehold interest was transferred several times before 1982, when the lessee in possession transferred its leasehold rights via an "assignment" to BAT Holdings I, which the district court found "explicitly assumed [the lessee's] obligations under the lease. *Id.* at 948-49. As a preliminary matter, the court in *Fay* held that, under Washington contract law, the transfer was a valid novation. *Id.* at 950-52. As a result, the Ninth Circuit concluded that

> the 1982 transfer . . . creat[ed] a new contractual obligation as of August 28, 1982. Gold clauses are enforceable after October 27, 1977, pursuant to section 5118; . . . because it is not a "past obligation" that the amendment is affecting but a new one entered into after the amendment was in force . . . the gold clause contained in the August 28, 1982 contract is enforceable.

Id. at 952-53. The Ninth Circuit "agree[d] with the district court in all respects" except as to a state law issue of waiver that is inapplicable to this case. 896 F.2d at 1227.

Fay is factually and legally indistinguishable from this case. Of even greater importance, *Fay* is based upon virtually identical precepts of *state* contract law concerning novations, as applied to the term "issued after" as used in the amendments to 31 U.S.C. § 5118(d)(2). In *Fay*, as in *Trostel*, state law provides that there

is a novation when there is a new obligor to a contract with a release of the old obligor. In *Fay*, as in *Trostel*, state law provides that when there is a novation, there is a new contract. In *Fay*, as in *Trostel*, the court found that when there was a new contract, a new post-1977 obligation *issued*. Therefore, it is clear that there is *not* a conflict between the Ninth Circuit and the Eighth Circuit, and that when the Ninth Circuit and the Eighth Circuit addressed factually similar obligations based upon analogous state law principles, their holdings are identical.

The only other case that squarely addresses the crucial issue in this case, *Wells Fargo Bank v. Bank of America*, 38 Cal. Rptr. 2d 521 (Cal. App. 1995),[1] came to the same conclusion the Eighth Circuit did in *Trostel*, on indistinguishable facts. In that case, the California court of appeals applied its state contract law of novation to the term "issued after" and ruled in complete congruity with the Ninth Circuit in *Fay* and the Eighth Circuit's decision below. The parties in *Wells Fargo* were successors in interest to a 1929 lease of prime Beverly Hills real estate. The equities of that case parallel those in the present case: like the Trostel heirs, the plaintiffs were "a small group of family trusts and individuals" who were seeking to enforce a gold clause in a 95-year lease providing for an annual rent of only $24,000; the current lessee, Triangle Company, was charging its sublessor, the Bank of America, $325,000 per year in rent. 38 Cal. Rptr. 2d at 523-24. In 1981, Triangle and the Bank of America terminated their sublease and, in exchange for $4,225,000, the bank "became the new lessee under the 1929 lease, assuming all obligations owed under it." *Id.* at 524. After one of the plaintiffs read a newspaper account of the *Fay* case, demand

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1. Respondents have not found and Petitioner has not noted any other state court, federal district court, or United States Court of Appeals for any circuit other than the Eighth and Ninth Circuits that have addressed the issues in this case.

was made for payment in gold coin. *Id.* When the Bank of America refused, the plaintiffs filed suit.

The *Wells Fargo* court applied California law and first concluded that the 1981 transaction was a novation and "thus constituted a new obligation." 38 Cal. Rptr. 2d at 525-26. After determining that the phrase "obligation issued" as used in the 1977 amendments was unambiguous, the court held that the novation between the bank and Triangle constituted a new obligation that issued, *i.e.*, was entered into, at a time when gold clauses were valid and enforceable — "In sum, we reach the same conclusion as did *Fay*, the only case to address a gold clause in the context of novation." 38 Cal. Rptr. 2d at 526-29.

American Life attempts to manufacture a circuit split by making an erroneous analogy to a decision, *Adams v. Burlington N.R.R. Co.*, 80 F.3d 1377 (9th Cir. 1996), where the Ninth Circuit flatly refused to find that a novation occurred each time railroad bonds were sold: "The date of issue of bonds is the date when they are *first* issued, not when they are resold." 80 F.3d at 1382 (emphasis in original). In fact, the plaintiff in *Adams* "point[ed] to cases in which novations rendered gold clauses in leases enforceable," specifically, *Fay* and *Wells Fargo*. 80 F.3d at 1382. The Ninth Circuit was unpersuaded and succinctly rejected the proposition that leases and bonds were comparable: "Whatever may be the rule regarding transfer of leases, bonds must continue to be viewed as issued on the date of first issue." *Id.* In contrast to the case at bar, the Ninth Circuit in *Adams* specifically found that a novation had not occurred, and indeed *could not* occur: "[E]ven if novation analysis were appropriate, the circumstances surrounding the corporate transactions in this case would not meet the formal requirements for a novation." *Id.* at 1383 n.4. The bond holders in *Adams* have already been unsuccessful in persuading this Court that the Eighth and Ninth Circuits are in conflict on an important federal question. *Adams v. Burlington*

N.R.R. Co., 80 F.3d 1377 (9th Cir.), *cert. denied*, 117 S. Ct. 171 (U.S. Oct. 7, 1996) (No. 96-51).

Ironically, the *Wells Fargo* court foresaw and rejected the contention, now renewed by American Life, that there is an analogy between cases involving *bonds* containing gold clauses, such as *Adams*, and other contracts or leases containing gold clauses:

> The bank raises the specter that as to bonds which contain gold clauses, bondholders would only need to sell their bonds to revive the gold clauses for the buyer. However, we note that a bond's date of issue for determining when an "obligation issued" and applying a gold clause has been deemed only the date of the first purchase of the bond, not each purchase or delivery of the bond after its first purchase. Such an interpretation focuses on the legal structure of the bonds *and not novation*.

Wells Fargo, 38 Cal. Rptr. 2d at 528 (emphasis added).

Clearly, and contrary to American Life's assertions, the present case does not present "a real and embarrassing conflict of opinion and authority between the circuit courts of appeal," *Pittsburgh S.S. Co.*, 340 U.S. at 502, and thus does not warrant review by this Court.

II. THIS ANOMALOUS CASE DOES NOT PRESENT AN "IMPORTANT FEDERAL QUESTION" OF PUBLIC SIGNIFICANCE.

American Life has also failed to satisfy the second condition in Rule 10(a), that any purported circuit inconsistency must concern an "important federal question." Although every party to a lawsuit considers its litigation of great import, certiorari is appropriate only "in cases involving principles the settlement of which is of importance to the public as distinguished from that of the parties . . . ." *Layne & Bowler Corp. v. Western Well Works*, 261 U.S. 387, 393 (1923).

Common sense and the unique chronological circumstances of this case serve to discredit American Life's claims that the Eighth Circuit's decision in this case could mean that "countless gold bonds, lease agreements, and other long-term instruments . . . will operate to resurrect previously unenforceable gold clauses, subjecting the issuers of such instruments to potentially crippling liability." Petitioner's Brief at 10. As demonstrated by the Ninth Circuit's holding in *Adams*, and reinforced by the reasoning in *Wells Fargo*, *Fay*, and *Trostel*, any gold clauses that remain in the "countless gold bonds . . . and other long-term instruments" pose no danger of being enforced, much less bankrupting their issuers. Moreover, due to the scarcity of long-term pre-1933 contracts of any sort that remain in force today, it is unlikely that the particular factual context that resulted in a novation in this case would be repeated; the requirement of a post-1977 assignment further reduces the potential pool of gold clause cases to a mere puddle. The few gold clauses that continue to exist in contracts are historic and legal anomalies, as evidenced by the existence of only three cases in the last twenty years that involve attempts to enforce such clauses in leases. As expressed by one Justice of this Court, "in allocating the Court's scarce resources, I consider it entirely appropriate to

disfavor complicated cases which turn largely on unique facts." *Singleton*, 439 U.S. at 945.

American Life attempts to attach some "special or important" significance to this case by implying that the enforcement of the gold option in the lease would operate as a windfall to Respondents. In its brief, American Life repeatedly decries the twenty-fold increase in the rent resulting from the enforcement of the gold clause as an injustice. Petitioner conveniently ignores the fact that the Trostel heirs are receiving only $23,000 per year for prime real estate in downtown Des Moines, with a fourteen-story building connected to adjacent buildings by overhead covered walkways.[2] Surely American Life does not contend that the Trostel heirs are receiving fair value in today's market — the fact that Petitioner attempted to pre-pay the twenty-two years of rent until 2016 is evidence of the undeserved largess it has been receiving. Instead, American Life is fighting to preserve a windfall that resulted from an unanticipated measure taken in response to a worldwide economic depression in 1933.

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2. Similar monetary disparities existed in *Fay* and *Wells Fargo*. In the latter, the court noted that the lessors were receiving $24,000 annually, whereas enforcing the gold clause pursuant to the original agreement increased the rent to between $381,000 and $565,000 per year, depending on the current price of gold. *Wells Fargo*, 38 Cal. Rptr. 2d at 524 n.2. It appears that the lessees in *Fay* chose not to bemoan the inequity of the loss of a rental rate negotiated in 1929.

III. THIS CASE INVOLVES QUESTIONS OF STATE CONTRACT LAW THAT PREDOMINATE OVER ANY FEDERAL ISSUES.

The standards for granting certiorari listed in Rule 10(b) and (c), governing inconsistent state court decisions and state and federal decisions contrary to clear Supreme Court precedent, are also inapplicable on their face to this case. In fact, American Life's complaints about the Eighth Circuit's decision are actually criticisms of well established doctrines of Iowa contract law. In that manner, this case parallels the legal context of the *Wells Fargo* case, where the court stated: "*[W]hether a gold clause originally agreed to prior to 1933 has any effect after the 1977 amendment is simply a matter of contract law and an analysis of the concept of novation under state law.*" 38 Cal. Rptr. 2d at 528 (emphasis added).[3] As such, the Eighth Circuit's determinations of Iowa contract law do not warrant review. American Life's protestations that it never intended to make a substituted contract and that the elements of a novation were not satisfied all relate to the Eighth Circuit's interpretation of state law issues that are preliminary to an analysis of the federal gold clause statutes. These contentions were made before that court, and subsequently raised again in American Life's petition for reconsideration, and the Eighth Circuit has twice rejected them.

The Eighth Circuit correctly interpreted Iowa law. Iowa law provides that "a novation is a substituted contract that includes as a party one who was neither the obligor nor the obligee of

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3. Additionally, "[w]e note that California law controls our interpretation of novation, even though our ensuing analysis involves the application of a federal statute. There is no federal law of contracts. State law controls both the construction of the contract and the question of breach." *Wells Fargo*, 38 Cal. Rptr. 2d at 526 n.3 (citations omitted).

the original duty." *Klipp v. Iowa Grain Indem. Fund Bd.*, 502 N.W. 2d 9, 11 (Iowa 1993) (quoting RESTATEMENT (SECOND) OF CONTRACTS § 279 (1981)). All that is required for a novation is that the new obligor be bound to the terms of the original contract, that the old obligor be discharged from any obligation under the contract, and that the obligee assent to the substitution. *Id.* at 11-12; *see Andrew v. American Sav. Bank & Trust Co. of Davenport*, 258 N.W. 921 (Iowa 1935). Such an arrangement is commonly referred to as a "simple novation." RESTATEMENT (SECOND) OF CONTRACTS § 280 cmt. d (1981).

The Eighth Circuit correctly found that a novation occurred in this case and that American Life "specifically agreed to be bound by the obligations described in the 1917 lease and its written amendments." 92 F.3d at 742. The assignment obligated American Life to all the terms of the lease, and it released the assignor, Statesman, from any obligation under the lease. In fact, as the Eighth Circuit pointed out, American Life did not dispute that a valid new obligation was formed. *Id.* at 740. Pursuant to the terms of the lease, the assent of the lessor was granted. In sum:

> [T]here is no question that a valid previous lease obligation existed between Statesman and the lessors, that all parties agreed to a new contract, that the obligations of Statesman were extinguished, and that a valid lease was created between lessors and American Life. . . . American Life does not suggest that the 1990 novation was anything other than a novation.

Id. at 740-41.

American Life argues that the Trostel heirs did not give their "prior consent" to the 1990 assignment, in spite of the fact

that the contract provided for that prior consent and, in fact, would have provided Respondents no opportunity to object to the assignment. Petitioner bases its rather lengthy argument that the 1990 assignment somehow changed the terms of the lease upon its assumption that the lease at that time lacked a gold clause. As the Eighth Circuit correctly held, the lease always contained the gold clause, but that clause was merely unenforceable until after 1977. The 1990 assignment did not create or add any lease terms or obligations that had not been there before.[4]

American Life's complaint that it did not intend to accept a lease containing a gold clause is legally irrelevant, and this argument has twice been rejected by the Eighth Circuit. American Life's intent in the contract is unambiguous and is represented by the clear terms of its signed, written agreement, not by its after-the-fact assertions of subjective intent. The 1990 Warranty Agreement was an arm's length transaction between two corporate entities with extensive business expertise. Both Statesman and American Life had the advice of sophisticated legal counsel. The failure of the two people who claim to be the most familiar with the transaction, the president and the chief financial officer of American Life, to read the lease or to form a

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4. Contrary to Petitioner's assertion, Statesman had the obligation before 1990 to pay in gold coin upon demand; Respondents had merely not invoked that option. American Life contends that the Trostel heirs' failure to demand payment in gold coin sooner indicates that there was no prior obligation, but this argument ignores the third paragraph of the lease, which states: "[I]t is expressly understood and agreed by and between the parties that no acceptance by the Lessor of any currency, legal tender, checks, coin, money, or value whatever, except standard gold coin of the United States of America, as hereinbefore specified, in payment of any installment of rent, shall be construed to be a waiver on the part of the Lessor of the right to demand the payment of any other unpaid installment of rent in standard gold coin of the United States of America . . . ." Resp. App. 1a-2a.

specific intent with respect to the gold clause before agreeing to be bound by its terms does not alter the plain, clear, and unambiguous language of the assignment,[5] which specifically adopted all of the terms of the 1917 lease.

IV. THE RECENT AMENDMENT OF § 5118 DOES NOT AFFECT THE EIGHTH CIRCUIT'S DECISION IN THIS CASE OR RAISE AN ISSUE THAT WARRANTS REVIEW BY THIS COURT.

Regardless of how Congress came to include this piece of legislation in the Economic Growth and Regulatory Paperwork Reduction Act, American Life is wrong in asserting that this amendment has reversed the opinion of the Eighth Circuit. The 1996 amendment to Section 5118(d)(2) provides that "any assignment or novation of [a pre-1977 gold clause] obligation after October 27, 1977" is not enforceable "unless all of the parties to the assignment or novation specifically agree to include a gold clause in the new agreement." Pub. L. No. 104-208, § 2609 (1996). Although the validity and interpretation of the statute itself is an issue of federal law (though not one of federal importance), whether the parties "specifically agreed" to the gold clause is a question of state contract law and *not* a federal question.

Whether the 1996 amendment even applies to a particular transaction requires an initial determination of whether the

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5. Iowa law is clear: "a party is usually bound by the documents he signs even though . . . [he] has not expressly accepted all of the contract provisions or is even aware of them." *Joseph L. Wilmotte & Co. v. Rosenman Bros.*, 258 N.W. 2d 317, 323 (Iowa 1977). "It is also the settled rule of law that if a party to a contract is able to read [the contract], has the opportunity to do so, and fails to read the contract he cannot thereafter be heard to say that he was ignorant of its terms and conditions for the purpose of relieving himself from its obligations." *Id.*

parties "specifically agreed" to a gold clause: if the answer is "Yes," then there is no federal issue to consider. In this case, the Eighth Circuit has already made this preliminary finding, and the panel stated in no uncertain terms that American Life "*specifically agreed* to be bound by the obligations described in the 1917 lease and its written amendments." 92 F.3d at 742 (emphasis added). Nothing could be more clear.[6]

If, as American Life contends, it can delete the gold clause because it did not specifically or separately agree to that provision, then every other provision of the lease agreement between American Life and the Trostel heirs is voidable at American Life's fancy. Petitioner's construction of the 1996 amendment requires one to believe that Congress intended to rewrite basic contract law by its use of the language "specifically agree to include a gold clause in the new agreement." However, it is a "settled principle of statutory construction that, absent contrary indications, Congress intends to adopt the common law definition of statutory terms." *United States v. Shabani*, 513 U.S. __, 130 L. Ed. 2d 225, 229 (1994). "As there exists no federal law of construction of contracts," *Vernon v. Resolution Trust Corp.*, 907 F.2d 1101, 1109 (11th Cir. 1990), the issue of whether the parties "specifically agree[d]" is governed by Iowa law.

To fully appreciate the absurdity of Petitioner's reasoning, one only has to ask what other provisions of the 1917 lease does American Life contend are unenforceable because it did not specifically agree to be bound by them. If American Life

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6. The Eighth Circuit further explained: "The language of the 1990 warranty agreement is not ambiguous. American Life agreed to be bound by the terms of the 1917 lease as recorded and as amended by the specified recorded amendments. The intent of American Life to be bound by these terms, which included an explicit gold clause, is expressed in clear and unambiguous language, and the contract thus should be enforced as written." *Id.* at 743.

believes that the assignment does not represent its consent to be bound by the "gold clause" in the 1917 lease, Petitioner can also contend that it is not bound by the provisions requiring payments on a monthly basis, that it is not bound to pay the taxes, or that it has not agreed to a lease at all! Under this logic, an American Life policyholder could similarly claim that an exclusion in a contract of insurance is not enforceable because he did not read it, did not know it existed, and did not intend to be bound by it. Would American Life agree that the exclusion was unenforceable?

Nonetheless, American Life again argues that there was no novation because it did not specifically consent to the inclusion of the gold clause in the lease assignment; the Trostel heirs have consistently contended that the lease documents establish American Life's specific agreement to *all* of the terms of the lease. The Eighth Circuit was presented with these competing accounts of the case and plainly decided that American Life was wrong. Regardless of whether this Court views the Eighth Circuit's conclusion as a factual finding or an interpretation of law (and state law at that), American Life's claim of error does not merit review. As Rule 10 states, "[a] petition for a writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law." Accordingly, this Court should decline American Life's invitation to second-guess the Eighth Circuit's conclusion that the parties "specifically agreed" to the gold clause, thus rendering the 1996 amendment to § 5118(d)(2) facially inapplicable to this case.

Even under the most favorable interpretation of American Life's position, certiorari is not warranted. Assuming *arguendo* that there was no specific agreement to include the gold clause in the 1990 Warranty Agreement, such that the 1996 amendment

is applicable on its face, and further assuming that the Eighth Circuit erred in not deeming the amendment to be applicable to this unique case, under Rule 10's demanding standards for granting discretionary review, such a "misapplication . . . of law" is not a sufficient basis for granting certiorari. Jurisdiction in this Court is not exercisable merely to give the party defeated in the court of appeals another hearing. *See Magnum Import Co. v. Coty*, 262 U.S. 159 (1923). If, as American Life contends, the 1996 amendment indeed directly overruled the Eighth Circuit's decision below, then the issues herein raised are confined to the circumstances of this case. However, "this Court does not sit to satisfy scholarly interest . . . [or] for the benefit of particular litigants." *Rice v. Sioux City Memorial Park Cemetery, Inc.*, 349 U.S. 70, 74 (1955). Thus, under American Life's own theory of the case, this litigation does *not* raise a federal question "the settlement of which is of importance to the public," *Layne & Bowler Corp.*, 261 U.S. at 393. Instead it presents wholly unique issues of importance exclusively to Petitioner.

CONCLUSION

Petitioner has failed to present any issues sufficient to invoke the jurisdiction of the Supreme Court of the United States. For that reason, and for all of the foregoing reasons, certiorari should be denied.

Respectfully submitted,

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APPENDIX A — ADDITIONAL RELEVANT PROVISIONS OF THE 1917 LEASE

Second. The Lessees covenant and agree to pay to the Lessor, as rent for said demised premises, during the first five years of said term, the annual rental of Twelve Thousand Dollars ($12,000.00), to be paid to the Lessor in equal monthly installments of One Thousand Dollars ($1,000.00), each in advance, on the first day of each month during said period of five years.

For the next succeeding forty-nine (49) years, the Lessees covenant and agree to pay to the Lessor, as rent for said demised premises, the annual rental of Fifteen Thousand Dollars (15,000.00), to be paid to the Lessor in equal monthly installments of Twelve Hundred Fifty Dollars ($1250.00) each, in advance on the first day of each month during said period of forty-nine years; and during the remaining forty-five (45) years of the term of this lease, the annual rental of Eighteen Thousand Dollars ($18,000.00), to be paid to said Lessor in equal monthly installments of Fifteen Hundred Dollars ($1500.00) each, in advance on the first day of each month during the remainder of the term of this lease.

* * *

At the option of the lessor, all payments under this lease shall be made in gold coin of the United States of America, of or equal to the present standard of weight and fineness.

Third. It is expressly understood and agreed by and between the parties that no acceptance by the Lessor of any currency, legal tender, checks, coin, money, or value whatever, except standard gold coin of the United States of America, as

hereinbefore specified, in payment of any installment of rent, shall be construed to be a waiver on the part of the Lessor of the right to demand the payment of any other unpaid installment of rent in standard gold coin of the United States of America, and all rental provided for in this lease shall bear interest at the rate of eight per cent per annum, payable annually, after the same becomes due and delinquent.

APPENDIX B — PROVISIONS OF THE 1990 WARRANTY ASSIGNMENT AND ASSUMPTION

Know All Men By These Presents: That The Statesman Group, Inc., a corporation organized and existing under the laws of the State of Delaware ("Grantor") in consideration of the sum of $10.00 and other good and valuable consideration in hand paid does hereby sell, transfer, assign and setover unto American Life and Casualty Insurance Company, an Iowa insurance corporation ("Grantee") the leasehold estate ("Lease") more particularly described in that certain Lease dated June 27, 1917, and recorded in the office of the Recorder of Polk County, Iowa, on April 25, 1923, in Book 870, page 497, wherein Joseph Trostel is the Lessor and Morris Joseph and Jacob Joseph are the Lessees. . . .

* * *

2. That said Lease has not been cancelled, surrendered or modified except pursuant to those supplements above specified and that said Lease is in full force and effect.

* * *

8. The Grantee, its successors and assigns in consideration of the Assignment and Transfer to it of the said Lease:

> (a) hereby accepts, assumes, and agrees to be bound by all of the terms and conditions to be kept, observed and performed by the Lessee in said Lease, as amended above described, from and after August 1, 1990, and covenants and agrees to faithfully comply with, carry out and perform all of the terms and covenants on the part of the Lessee under said Lease as so modified from and after said date; . . .

Supreme Court, U.S.
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JAN 27 1997
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No. 96-964

In The

Supreme Court of the United States

October Term, 1996

AMERICAN LIFE & CASUALTY INSURANCE COMPANY,

Petitioner,

v.

ANNE C. TROSTEL, et al.,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

REPLY BRIEF FOR THE PETITIONER

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REPLY BRIEF FOR THE PETITIONERS[1]

1. Respondents' opposition to certiorari confirms, unwittingly, that the amendment to Section 5118(d)(2) enacted by Congress on September 30, 1996, had the specific effect of reversing the Eighth Circuit's decision in this case. Respondents emphasize that this case is "factually and legally indistinguishable" from the two cases on which the Eighth Circuit exclusively relied – *Fay Corp. v. BAT Holdings I, Inc.*, 646 F. Supp. 946 (W.D. Wash. 1986), *aff'd sub nom. Fay Corp. v. Frederick & Nelson Seattle, Inc.*, 896 F.2d 946 (9th Cir. 1990), and *Wells Fargo Bank v. Bank of Am.*, 38 Cal. Rptr. 2d 521 (Cal. App. 1995). Opp. at 6-8. Specifically, Respondents stress that here, as in *Fay Corp.* and *Wells Fargo Bank*, the Court of Appeals held that a post-1977 assignment of a pre-1933 lease containing a gold clause constituted a "novation" of the lease agreement and thus "revived" the previously unenforceable gold clause under Section 5118(d)(2) which at the time of the Eighth Circuit's decision permitted enforcement of gold clause obligations "issued after October 27, 1977." 31 U.S.C. § 5118(d)(2).

Less than two months after the decision below was announced, however, Congress enacted an amendment to Section 5118(d)(2) specifically designed to overrule the *Fay Corp.* and *Wells Fargo Bank* cases. Responding particularly to the "unfair treatment to lease holders" reflected in those cases, 142 Cong. Rec. H4755 (May 7, 1996), Congress amended Section 5118(d)(2) to make clear that a post-1977 assignment or novation of a pre-1977 obligation

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[1] Petitioner's Rule 29.6 Statement appears at Petition for a Writ of Certiorari at ii.

containing a gold clause does not revive the gold clause *"unless all parties to the assignment or novation specifically agree to include a gold clause in the new agreement."* Pub. L. No. 104-208, § 2609 (emphasis added).[2]

The Eighth Circuit's holding in this case vividly illustrates the "unfair treatment to lease holders" that motivated Congress to enact the 1996 amendment to Section 5118(d)(2). The lease at issue here has been controlled by Petitioner's corporate parent, The Statesman Group ("Statesman"), since 1969, when another entity under Statesman's control, State Automobile and Casualty Underwriters ("State Auto"), acquired the lease through an assignment from an unrelated entity. In December 1985 State Auto assigned the lease to Statesman, and in August 1990 Statesman assigned the lease to Petitioner, its wholly owned subsidiary. It is undisputed that State Auto's 1985 assignment of the lease to Statesman, and Statesman's 1990 assignment of the lease to Petitioner, were effectuated for reasons wholly internal to the organization. Indeed, Respondents were not signatories to, or otherwise involved in, the 1985 and 1990 assignment agreements; their prior consent to the assignments was supplied by operation of the assignment clause in the original 1917 lease. Nor do Respondents dispute that

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[2] The 1996 amendment also added the following sentence to Section 5118(d)(2): "Nothing in the preceding sentence shall be construed to affect the enforceability of a Gold Clause contained in any obligation issued after October 27, 1977 if the enforceability of that Gold Clause has been finally adjudicated before the date of enactment of the Economic Growth and Regulatory Paperwork Reduction Act of 1996." Pub. L. No. 104-208, § 2609. Respondents do not dispute that this case had not been "finally adjudicated" before September 30, 1996.

neither Statesman nor Petitioner were even aware in 1990 that the original 1917 lease contained a gold clause. Finally, it is undisputed that Respondents themselves were not aware until 1991, long after the 1990 assignment agreement had been entered by Statesman and Petitioner, that Congress had legalized the use of gold clauses in post-1977 obligations. Indeed, for over three years after Respondents allegedly became entitled under the 1990 assignment agreement to demand payment in 1917 gold coins (which, in current dollars, amounts to an annual rent of approximately $460,000), Petitioner tendered, and Respondents accepted, monthly rental payments totaling $23,000 per year.

In the face of these undisputed facts, and while acknowledging that "the intent of the parties controls" the interpretation of a written agreement, the Eighth Circuit held that Petitioner was bound under the 1990 assignment agreement to make its rental payments in 1917 gold coins. The Eighth Circuit did not attempt to explain why Statesman, gratuitously and for no apparent reason, effectively raised its own annual rent obligation from $23,000 to approximately $460,000 by saddling its wholly-owned subsidiary with an obligation to pay rent in 1917 gold coins. Nor did the panel below attempt to explain why Respondents refrained for over three years from demanding the 20-fold increase in rent to which they were allegedly entitled.[3] Nor did the panel below

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[3] In their brief in opposition to certiorari, Respondents acknowledged that under their argument the obligation to pay rent in gold coins was actually created in 1985, when State Auto assigned the lease to Statesman. Opp. at 14 n.4. Respondents admit that they "had merely not invoked" their alleged right to

attempt to explain how the parties to the 1990 assignment agreement could have intended to obligate Petitioner to pay its rent in gold coins when none of the parties – Statesman, Petitioner, or Respondents – were even aware of the gold clause when the 1990 assignment agreement was entered.[4]

The 1996 amendment to Section 5118(d)(2), which was enacted less than two months after the Eighth Circuit's decision in this case, was specifically aimed at preventing precisely the result reached by the panel below. Designed to "ensure[ ] that the old gold clauses apply only when such a clause is the *explicit intention* of both parties to the contract," 142 Cong. Rec. H4755 (emphasis added), the amendment prohibits the enforcement of gold clauses in pre-1977 obligations, "notwithstanding any assignment or novation of such obligation

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insist on a 20-fold increase in rent, *id.*, but offer no explanation for, in effect, donating approximately $437,000 per year to their tenant for over eight years. Respondents' failure to explain their generosity exposes the transparently contrived nature of their claim. The truth, of course, is that the parties to the 1985 and the 1990 assignment agreements did not create an obligation to pay rent under the lease in gold coins.

[4] Respondents' claim that the 1990 assignment agreement "was an arm's length transaction between two corporate entities with extensive business expertise" and formed with "the advice of sophisticated legal counsel." Opp. at 14. In truth, however, the transaction was between the parent corporation (Statesman) and its wholly owned subsidiary (Petitioner), and it was entered, as the district court found, purely "for reasons internal to the organization of Statesman." Appendix to Petition for a Writ of Certiorari ("App.") at 24a n.1. In any event, the key point, which Respondents do not dispute, *see* Opp. at 14-15, is that neither Statesman nor Petitioner genuinely intended to revive the gold clause in the 1990 assignment agreement.

after October 27, 1977, unless all parties to the assignment or novations specifically agree to include a gold clause in the new agreement." Pub. L. No. 104-208, § 2609. Respondents argue that the Eighth Circuit's decision below conforms to the requirements of the 1996 amendment, noting that the Court of Appeals found that the original 1917 lease had been incorporated by reference into the 1990 assignment agreement and that Petitioner had thus "*specifically agreed* to be bound by the obligation described in the 1917 lease and its written amendments." Opp. at 16, quoting App. at 15a. But the 1996 amendment specifically provides that a standard assignment or novation incorporating the terms, including a gold clause, of a pre-1977 obligation is not enough. Indeed, the *unintentional* revival of a gold clause through the assignment or novation of a pre-1977 obligation is precisely – *precisely* – what Congress sought to prevent in amending Section 5118(d)(2). Thus, Congress expressly provided that a gold clause is unenforceable unless it was specifically negotiated and agreed to by all parties to the assignment or novation of the pre-1977 obligation. Here, as previously noted, Respondents admit that neither Statesman, nor Petitioner, nor even Respondents themselves, even *considered* the gold clause in connection with the 1990 assignment agreement, let alone intended to revive it. The Eighth Circuit acknowledged this fact as well. *See* App. 9a, 11a. Accordingly, because none of the relevant parties specifically agreed to include a gold clause in the 1990 assignment agreement, it is clear that Congress' recent amendment to Section 5118(d)(2) applies to this case and that Petitioner cannot be required to pay its rent in gold coins.

Respondents also argue that if we are correct concerning the applicability to this case of the 1996 amendment to Section 5118(d)(2), "then every other provision of the lease agreement between American Life and the Trostel heirs is voidable at American Life's fancy." Opp. at 16. The only provision of the lease agreement, however, governed by Section 5118(d)(2) is the gold clause, and it has been governed by federal law since 1933. Obviously, no other term of the lease is embraced by our argument concerning Section 5118(d)(2).

Finally, Respondents argue that even if the 1996 amendment to Section 5118(d)(2) governs this case, the Eighth Circuit's "misapplication . . . of law" is too narrow and unimportant to warrant this Court's review. Opp. at 17-18. The Eighth Circuit, however, did not misapply the 1996 amendment; the amendment was not enacted until two months after the Eighth Circuit rendered its decision. Accordingly, because the Court of Appeals did not consider this intervening and plainly dispositive legislation, this case is a textbook occasion for the Court to grant the petition, vacate the judgment below, and remand the case for reconsideration in light of the 1996 amendment to Section 5118(d)(2). *See, e.g., Bureau of Econ. Analysis v. Long*, 454 U.S. 934 (1981); R. Stern, E. Gressman, S. Shapiro & K. Geller, *Supreme Court Practice* 249 (7th ed. 1993). Alternatively, the Court should grant the petition and set this case for plenary review. As discussed in the petition (and below), the Eighth Circuit's decision below conflicts with the reasoning of a recent Ninth Circuit decision involving gold clauses in railroad bonds. Pet. at 24-26. The logic of the decision below cannot reasonably be confined to pre-1933 leases, but extends as well to gold

bonds and other long-term instruments containing gold clauses. Indeed, the issue presented by this case was deemed by Congress to be sufficiently important to enact a statute specifically resolving it. The correct application of that statute is, likewise, important enough to warrant this Court's review.

2. The brief in opposition to certiorari offers nothing to dispel the conclusion that the decision below conflicts directly with the Ninth Circuit's decision in *Adams v. Burlington N. R.R. Co.*, 80 F.3d 1377 (9th Cir.), *cert. denied*, 117 S. Ct. 171 (U.S. Oct. 7, 1996). Respondents emphasize that the Ninth Circuit in *Adams* rejected the bondholders' claim that "a novation occurred each time railroad bonds were sold." Opp. at 8. Respondents ignore, however, that the Ninth Circuit in *Adams* also rejected the bondholders' claim that a 1992 supplemental indenture in which a third party, CSX Transportation, Inc., expressly assumed the obligation to repay the bonds "according to their tenor" constituted a post-1977 novation of the bond agreement that revived the gold clause contained in the original bond. *See Adams*, 80 F.3d at 1382.

The central fact, therefore, in both *Adams* and the instant case is that a contracting party's rights and obligations were transferred after 1977 to a third party in an agreement that incorporated the terms of the original instrument, including a gold clause, by reference. Yet, the two courts of appeals came to precisely opposite conclusions as to the enforceability of the gold clauses. Apart from a conclusory assertion that leases and bonds are not "comparable," Respondents make no effort to explain the conflicting results reached in the two cases. Opp. at 8. We respectfully submit that the Ninth Circuit in *Adams* got it

right and that this Court should grant certiorari to resolve the conflict and to correct the Eighth Circuit's decision.

CONCLUSION

For the foregoing reasons, and those stated in the petition, this Court should grant the petition for a writ of certiorari, vacate the judgment of the Court of Appeals, and remand the case for reconsideration in light of the 1996 amendment to 31 U.S.C. § 5118(d)(2). Alternatively, the petition should be granted and the case set for plenary review.

Respectfully submitted,

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